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THE
OHIO NISI PRIUS REPORTS.

NEW SERIES. VOLUME IV.

BEING REPORTS OF CASES DECIDED

BY THE

SUPERIOR, COMMON PLEAS, INSOLVENCY AND
PROBATE COURTS OF THE
STATE OF OHIO.

VINTON R. SHEPARD, EDITOR.

0

CINCINNATI:
THE OHIO LAW REPORTER COMPANY.
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Rec. May 24, 1907

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NEW SERIES—VOLUME IV.

CAUSES ARGUED AND DETERMINED IN THE SUPERIOR,
COMMON PLEAS, PROBATE AND INSOLVENCY
COURTS OF OHIO.

CHOICE OF MATERIAL FOR STREET PAVING.

[Common Pleas Court of Butler County.]

JOHN B. SCOTT, A TAX-PAYER, ETC., v. THE CITY OF HAMILTON
ET AL.*

Decided, August 1, 1904.

Street Improvements—Selection of Material—Not the Privilege of Abutting Property Owners—Selection of, by Council in the Alternative—Not a Delegation of Power—Asphalt and the Trust.

1. The action of council in designating, in the alternative, the kind of material to be used in improving a street is not a surrender of any of the legislative power with which it is invested, and its agent, the board of public service, has the right under such a determining ordinance to make the selection from the materials named, and the material so selected becomes the material chosen by council.
2. The right is not given by the Legislature to abutting owners to name the material which shall be used in improving a street, and when the board of public service, acting under the authority of a determining ordinance, has exercised its discretion in that behalf its action can not be interfered with by the courts, except for fraud or collusion or such gross carelessness as amounts to fraud.

*Affirmed by the circuit court, *Scott v. City of Hamilton*, 7 C. C.—N. S., 493.

3. Nor is the discretion of the board of public service to be interfered with in the matter of awarding the contract to another than the lowest bidder, except for the same cause.
4. The court finds from the evidence in this case that asphalt is not a patented article, and not under the exclusive control of any company or trust; and while some of the machinery used by certain companies is patented, there is other machinery which is not patented, and asphalt material can be procured from other companies.

BELDEN, J.

This is an action for injunction. It does not present the questions just decided in the cases of J. M. Quill and the Kirchner Construction Company against the city of Hamilton, for the reason that this plaintiff is a tax-payer of the city of Hamilton, and brings the suit, not only in his own behalf, but in behalf of the city. He seeks to set aside the award of a contract to William N. Andrews for the paving of East High street in the city of Hamilton, Ohio, which award was made on the first day of July, 1904. The grounds upon which the court is asked to set aside that contract or award are these:

1. Plaintiff says that the particular kind of paving material that was to be used on said street, that is, whether it should be sheet asphalt, asphalt block, or vitrified brick, together with foundations, curbing, guttering and filling material, was not selected and determined upon by the council of said city, but was selected, decided upon and determined by the board of public service of said city after the bids for paving said street were received and filed.

That the board of public service is merely an administrative body of said city, and had no right or authority under the law to choose, decide upon and determine the kind of paving material to be used on said street, to-wit, asphalt block and concrete and limestone curb for the paving of said street; but the council of said city of Hamilton is the legislative body of said city and was the proper body and authority to choose, decide upon and determine the kind of paving material with which said street should be paved. This is one of the important grounds set out as a reason why the court should set aside this contract.

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2. Plaintiff and more than a majority of the owners of the abutting real estate on said street between said points measured by the front foot, to-wit, representing about ninety per cent. of said frontage, petitioned council for the paving of said street with vitrified brick, but council ignored and disregarded said petition, and illegally referred the choice of said materials to be made by the board of public service as above stated. Plaintiff avers that vitrified brick is the proper material for the paving of said street, and is superior for said purpose to asphalt block, and is the material which plaintiff and most all of the property owners of said street wanted, and still want, placed on said street. Plaintiff also avers that block asphalt is a faulty, defective and worthless paving material, and that it fails to give satisfactory service, and that the streets of Hamilton that have been paved with block asphalt have proved defective and worthless.

The court will dispose of the second ground at once, for this reason, that the law of Ohio confers upon the members of the board of public service, acting as a board, the power to select the material with which the streets shall be paved. It would seem only reasonable and proper for the members of the board to consult the interests and wishes of property owners who have to pay for this improvement—at least have to pay for the greater part of it—but there is nothing in the law requiring the members of the board to consult property owners upon this point, and the court is bound by the law as long as the members of the board of public service act in good faith, and without fraud or collusion, or such gross negligence as amounts to fraud.

Some arguments might be made that the property owners ought not to be consulted in this matter, for the reason that the streets of the city are used by all the inhabitants of the city, and by people who travel to the city and through it, and that it is important that the best material be laid upon one street, or section of a street, as was laid originally. But it is not worth while to enter into an argument upon that subject, for the reason stated, that the Legislature has not given the property owners the right to select the material—that right

is given by the General Assembly, the law-making power for the city, to the members of the board of public service when they act as a board, and the court can not take away that right from them, except in case of fraud, or such gross and wanton negligence as amounts to fraud. Therefore, that ground the court finds not well taken.

3. Plaintiff avers that the bid of William N. Andrews for said paving was not the lowest and best bid therefor, but that there were other contractors who made bids for said paving at much lower figures than the bid of William N. Andrews; and there were bids by other contractors for vitrified brick at much lower figures than the bid of William N. Andrews for vitrified brick or asphalt block.

Plaintiff avers that said other contractors are responsible parties and are competent and experienced in the work of paving, but that said William N. Andrews has had no practical or scientific knowledge and skill thereof as required; and further that he has no plant and no means of establishing a plant, and that it will require a large sum of money as an investment in a plant or manufacturing establishment to prepare said paving materials.

Now, in regard to the allegation that the bid of William N. Andrews is not the lowest and best bid therefor, the question is whether the members of the board of public service had the power to award the contract to one whose bid was higher than that of others.

The court has already cited the case of *Coppin v. Hermann, et al, Com'rs*, 6 N. P., 452, decided in the Superior Court of Cincinnati, General Term, November, 1889.

The discretion is vested, as I have stated, with the members of the board. Upon this point reference will be made to the following additional authorities: *State, ex rel Walton, v. Hermann et al*, 63 O. S., 440 (where there is a difference in bid of \$3,280); *Field v. Barber Asphalt Co.*, Advance Sheets U. S. Supreme Court, July 15, 1904, p. 784; *Hubert et al v. Mason*, 29 O. S., p. 562; *State v. Board of Education (Columbus)*, 20 Bull., 156; Beach on Public Corp., Section 279.

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The discretion of the members of the board of public service is not to be interfered with except for fraud, or gross carelessness amounting to fraud. *State v. Board Public Affairs*, 4 C. C., p. 76; *State v. Village St. Bernard*, 10 C. C., p. 74; *Com'rs Wood Co. v. Pargillis*, 10 C. C., p. 376; *State v. Com'rs Shelby Co.*, 36 O. S., p. 331; Spelling on Extra. Relief, Sections 1432, 1433.

I find that these members of the board of public service had discretion in the matter, and the evidence does not show any fraud or collusion on their part, but I think does clearly show an attempt on their part to discharge their duties honestly and faithfully. That ground is found not well taken.

4. Plaintiff avers that said board of public service made no examination or investigation of the respective merits of the materials bid upon by said William N. Andrews and the other contractors who made bids on said paving, and did not award said contract to William N. Andrews in good faith, but the same is a fraud upon the rights of the plaintiff and all other property owners on said street between said points mentioned, and upon all tax-payers of the city of Hamilton who will be required to pay for said improvement.

The court finds that ground not sustained by the evidence, and, therefore, that is not well taken.

5. Plaintiff says according to the ordinance authorizing and providing for said improvement, a portion of the costs thereof was to be assessed against property abutting said improvement benefitted thereby, and a portion of said costs and expenses was to be paid by the city of Hamilton; that no certificate as required by Section 45 of the Ohio Municipal Code act, and now Section 1536-205 of the Revised Statutes of Ohio, was by the auditor of said city before or at the time of the passage of the resolution awarding said contract, or before or at the time of the entering into of said contract, made, nor was such a certificate filed and recorded.

The court finds that is not sustained by the evidence. A certificate of the city auditor was on file in accordance with law.

Plaintiff says that if said contract is entered into and fulfilled it will be an abuse of the corporate powers of said city,

and a misapplication of the funds of said city, and will cause an illegal tax to be assessed against the plaintiff and all others who own real estate abutting upon said street, and upon the plaintiff and all tax-payers of said city who will be required to pay a portion of the city's share of the costs of said improvement. There was an amendment to that petition on July 23, 1904, in which these allegations are made:

That the proceedings adopted and attempted to be adopted by the city of Hamilton for the improvement of East High street as alleged in his petition, and for contract entered into or about to be entered into between said city of Hamilton and said William N. Andrews for said paving, and any and all assessments to be levied therefore are, and will be, irregular, illegal and void, for the following reasons, in addition to those stated in said petition.

Asphalt block is a patented article and is, and for a long time has been, under the exclusive authority, direction and control of a certain company or trust that owns said patent right, and said company or trust controls the use of asphalt block and the price for which asphalt blocks are sold, and thus has it in its own power to prevent and destroy any competitive bidding for paving with said asphalt block except the bid of William N. Andrews; and that for the above reasons there was no competitive bidding with William N. Andrews for the paving of said East High street with asphalt block; that said trust has an agent in Ohio, to-wit, C. H. Burchinal, who has sole charge of all the territory for said trust in said state and that there was collusion between said agent, William N. Andrews and said board of public service.

The evidence does not sustain any of those allegations. The evidence shows that asphalt block is not a patented article, that it is not under the exclusive authority, direction and control of any one company, or trust, but that asphalt can be bought from different companies, and that while some of the machinery used by certain companies is patented, there is other machinery which is not patented, and asphalt material can be procured from other companies. The court finds that the averments of the amendment to the petition are not sustained by the evidence.

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This leaves for decision the first ground heretofore referred to, the one to which the court and counsel have paid most attention namely: Was there an illegal delegation of power of council to the board of public service in this case in regard to the selection of material?

The council passed what is called a determining ordinance, providing that this street might be paved with block asphalt, sheet asphalt, or brick. The board of public service advertised for bids upon these three materials, and they selected the bid, and awarded the contract to the bidder for asphalt block, Mr. Andrews being the only bidder on that material.

This presents a very important question. Many authorities hold that legislative power can not be delegated. *Thompson v. Schmerhorn*, 6 N. Y., 92; *Birdsall v. Clark*, 73 N. Y., 73; *Smith v. Duncan*, 77 Ind., 92; *Hydes & Goose v. Joyce*, 4 Bush., 464; *Knauss v. Columbus*, 13 Dec., 200; Am. Dec., 311; Cooley on Const. Lim., p. 248 (6th Ed).

The law is very plainly stated in 77 Ind. Rep., in the case of *Smith v. Duncan*. I read from the syllabus:

“The order of a city council for a street improvement must specify the nature and plan of the work in such manner as to afford a basis for letting the contract.

“An order which does not specify of what wood the blocks shall be made, how they shall be laid, and to what grade, but leaves these and like particulars to the city engineer, is insufficient, and will not warrant a precept for the enforcement of an assessment.

“Such delegation of the powers and duties of the council to the engineer is not permissible.”

On page 95 of the opinion this is found:

“In the case of *Merill v. Abbott*, 62 Ind., 549, after a careful review of the authorities, it was said: ‘We feel justified in saying that an order for a street improvement must, in appropriate terms, either ordain, resolve or declare that the street to which it refers shall be improved, specifying the nature, character, or plan of the proposed improvement in such a way as to give at least a general direction to the letting of the work and the execution of the contract contemplated by such order. Such an order is, in some respect, analagous to a judicial act, and ought clearly and explicitly to prescribe what it authorizes to

be done as regards the contemplated improvement to which it is intended to apply."

Then it holds that the law does not contemplate the delegation of such power to the engineer. The question in this case is, whether this was a delegation of power which was unlawful.

Section 55 of the Municipal Code, as passed in 1902, provides (after stating that council shall determine whether to proceed with the proposed improvement or not, or whether the claims for damages filed shall be judicially inquired into, etc.) that, "and if it decides to proceed therewith, an ordinance for the purpose shall be passed * * * said ordinance shall set forth specifically the lots and lands to be assessed for the improvement; shall contain a statement of the general nature of the improvement and the character of the materials thereof."

Now, that was amended on April 20, 1904 (97 O. L., pp. 122-123), as follows:

"And if it decides to proceed therewith, an ordinance for the purpose shall be passed; said ordinance shall set forth specifically the lots and lands to be assessed for the improvements; shall contain a statement of the general nature of the improvement and the character of the materials which may be bid upon therefor."

Now, it is argued those "materials" mean guttering, man-holes, etc., called for in the specifications. But the court thinks that point is not well taken. The word "materials" means the character of the material that enters into the paving, such as asphalt block, asphalt sheet, or brick, or other permanent paving material.

Council has control of the streets (Municipal Code, Section 28). Council may make assessments for improvements (Municipal Code, Section 50, *et seq.*).

I have quoted Section 55 of the Municipal Code (as amended in 97 O. L., 123), applying to cases where bids have been received. It does not seem to apply to cases like the one at bar, where bids have not been received. It is retroactive in its nature. I find, therefore, Section 55 does not apply.

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The board of public service is undoubtedly an administrative body. Section 139, Municipal Code (1902), reads as follows:

“The directors of public service shall be the chief administrative authority of the city, and shall manage and supervise all public works and all public institutions, except where otherwise provided in this act.”

But while an administrative body, they have authority to enter into contracts. I cite Section 143, of the Municipal Code:

“The directors of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When any expenditure within said department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council and when so authorized and directed, the directors of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city.”

The board of public service is authorized to sign contracts for council. Section 123 of the Municipal Code is as follows:

“The powers of council shall be legislative only, and it shall perform no administrative duties whatever, and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as may be otherwise provided in this act. All contracts requiring the authority of council for their execution should be entered into and conducted to performance by the board of officers having charge of the matters to which they relate, and after authority to make such contract has been given and the necessary appropriation made, council shall take no further action thereon.”

Now the question is this case is whether council has acted. Undoubtedly if council would pass an ordinance declaring East High street should be paved, and name no material, that would not give the board of public service power to select the material. But here they have named three materials, in the alternative. Council has named them—not simply the board of public service—but the legislative body has named the three materials,

and the question is whether delegation of power to select one of three materials named is delegation of legislative authority.

In 3 C. C., 403, *State, ex rel, v. Board of County Com'rs of Williams Co.*, the syllabus reads as follows:

"An act authorizing county commissioners to issue bonds, either to repair, enlarge or improve its court house or build a new one, is not a delegation of power to determine what shall be done, and thus taking effect on the approval of the board."

I cite from 1 Bates' Digest, p. 427, Section 54. In this case there was a discretion in the county commissioners to either repair, enlarge, or improve its court house, or build a new one, yet the courts have held that is not an illegal delegation of power.

I cite further 24 Bull., 175, *Bonebrake v. Wall*:

"A statute does not delegate legislative power by giving to a board discretionary power as to the details of governing a city."

In 1 O. S., p. 77, *Railway Co. v. Com'rs of Clinton Co.*, the Supreme Court says, in the fourth syllabus: "The power of the General Assembly to pass laws can not be delegated by them to any other body, or to the people." But held in that particular case that there was no unlawful delegation of power. But Judge Ranney, in his opinion in the case, discussing this question (after stating that the General Assembly can not surrender any portion of legislative authority with which it is invested, or authorize its exercise by any other person or body) says:

"While this is so plain as to be admitted, we think it equally undeniable that the complete exercise of legislative power by the General Assembly does not necessarily require the act to so apply its provisions to the subject-matter as to compel their employment without the intervening assent of other persons, or to prevent their taking effect only upon the performance of conditions expressed in the law.

"The true distinction, however, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made."

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Now, it seems to the court that this was authority or discretion conferred as to the execution of this particular matter passed by the council, and it falls within the principle laid down by Judge Ranney.

The same doctrine governs in what is known as the local option case (*Gordon v. State*, 46 O. S., 607). The court in its opinion in the above case refers to this opinion of Ranney, J., and approves the same (p. 633).

Alternative bidding is permissible. The authority, I think, comes from the act of council, not from the act of the board of public service.

I think this question has fairly been decided by the circuit court (although the opinion was not referred to by counsel), in the 17 C. C. Rep., 516, affirmed in 60 O. S., 621. This was an act of the Legislature providing for the appointment of commissioners to build the new water works for the city of Cincinnati. I read the second and third syllabi:

"2. The action of the commissioners in delegating certain of their powers to the chief engineer to determine as to certain matters, is not such a delegation of power in the sense that it is taking away from the commissioners the power vested in them. The duties the chief engineer performs are done as the agent and employe of the trustees. He uses his technical knowledge as their agent, and he is entirely subject to the control of the trustees, and what is done is by their authority, and is under their control, and his exercise of this power is their exercise of it.

"3. There can be no objection to the provision in the contract as to alternative bidding, nor to the provisions therein by which alterations and modifications in the contract are provided for. In practice such changes have always been found necessary, and in the nature of things must be." *Ampt v. City of Cincinnati et al*, 17 C. C., 516.

Now, it looks to me if this was an action of a private individual there would be no question about it.

If A, a resident of New York, desires to build a house in Hamilton, and executes a power of attorney authorizing B, of the last named place, to sign a contract for the erection of a house of wood, or brick, or stone, B has the right to select any

one of these materials, and enter into a contract for the same, and when such contract is executed and delivered, it is the contract of A, the principal, and not that of B, the agent. "*Facit per alium, facit per se.*"

So in this case when the city council designated the kind of materials to be used, in the alternative, its agents, the board of public service, had the right to make a selection, and when made, such selection became the material chosen by the city council. The contract is binding upon the city, because the city council, the local legislature, authorized the selection of the material.

The contract required the authority of council, but after that authority was given the execution of the contract devolved upon the board of public service. See Sections 123 and 143, Municipal Code.

The voice which speaks the will of the municipality is the council, but the hand which records that expression is the board of public service.

The court finds, therefore, that the plaintiff has not established the allegations of his petition, and is not entitled in law to the relief for which he prays. The application for temporary injunction will be refused; the case having been heard upon its merits, the petition will be dismissed, at costs of plaintiff.

Andrew & Harlan, for plaintiff.

Warren Gard, Frank Richter and U. G. Denman, for defendant.

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NEGLIGENCE IN PASSING AROUND THE END OF A STREET CAR.

[Superior Court of Cincinnati, General Term.]

THE CINCINNATI STREET RAILWAY CO. v. LANDON McBEE.

Decided, February 9, 1905.

Bill of Exceptions—Not Rendered Invalid—By Failure to Endorse Extension of Time Within the Five Day Period, When—Negligence—Rights of Pedestrians in Crossing Street Car Tracks—Doctrine of the Snell Case Applied.

1. Should a judge through mistake or forgetfulness fail, within the initial period of five days, to make his endorsement upon a bill of exceptions of the extension of the time for the signing thereof, the subsequent endorsement of the extension thus granted and signing of the bill within the extended period would be in accordance with law.
2. Contributory negligence should not be imputed to one who, in alighting from an electric car at a regular stopping place, passed around the rear end, and was struck by a rapidly moving car running in the opposite direction on the parallel track, and which he could neither see nor hear by reason of the obstruction caused by the car upon which he had been a passenger, in the absence of clear proof of proper warning by the agents of the operating company.

HOSEA, J.; FERRIS, J., and HOFFHEIMER, J., concur.

The action to strike from the files the bill of exceptions was considered at a previous sitting of the general term, and upon re-consideration we perceive no reason to recede from the views then expressed. The bill of exceptions being placed in the hands of the trial judge in proper time, on October 20, 1903, his jurisdiction over it was complete. The initial period of five days allowed for his action would have expired on October 25, excepting for the operation of Section 4951, Revised Statutes, under which the period expired on October 26th; and the expiration of "ten days beyond the expiration of the period aforesaid" expired with November 5, on which latter day the judge signed the bill.

It is claimed, however, that, as the endorsement of the extension was dated November 5, the extension must be taken to have been made on that day, but this does not necessarily follow.

Omnia rite esse acta praesumuntur is a maxim recognized from time immemorial as applying to the acts of public officers (*Downing v. Ruger*, 21 Wend., 178). The rule that "acts done which pre-suppose the existence of other acts to make them legally operative, are presumptive proof of the latter," was early adopted and has been repeatedly followed in Ohio (*Lessee of Ward v. Barrows*, 2 Ohio St., 242; *Lessee of Combs v. Lane*, 4 Ohio St., 612; *Reynolds v. Schweinefus*, 27 Ohio St., 311; *Knox County v. Bank*, 147 U. S., 141).

A practical application of this rule has been made to bills of exceptions with the holding that "the record imports verity and can not be impeached by evidence *aliunde* tending to show that the requirements of the statutes were not complied with" (*Huddleston v. Hendricks*, 49 Ohio St., 297; *Findlay Brewing Co. v. Brown*, 62 Ohio St., 202; *Felch, Assignee, v. Hodgman*, 62 Ohio St., 312). In the latter case the rule is stated with added force as follows:

"The ordinary rule is that when any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites affecting its validity were complied with."

In the present case the judge endorsed the extension upon the bill and signed the bill within the extended period—all in accordance with the law. The date of the endorsement was not required by statute, and consequently was not necessary (*Felch v. Hodgman, supra*).

"When the question is not of power, but of the manner in which a supposed act was done, the presumption is in favor of the officer having performed his duty in a legal and sufficient manner. * * * When a statute requires an act to be done, and gives no direction as to the mode of performance, and proceedings are had in the direction of performance, the duty will be presumed to have been rightly performed until the contrary is made to appear" (*Reynolds v. Schweinefus, supra*, pages 320 and 321).

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It may be added, that, even if the court by mistake or forgetfulness neglected to make the endorsement of the extension within the first five days, his subsequent endorsement prior to signing the bill must be regarded as within the general power of correction vested in the courts of Ohio by Section 5114, Revised Statutes, and as curing the defect (*Railway v. Bailey*, 70 O. S., 88).

The trial errors complained of by the plaintiff in error here mainly hinged upon the question, whether the verdict and judgment in the court below were against the weight of the evidence and contrary to law. The facts in brief, were that McBee, a passenger on a northbound car, gave the signal to stop at an intersecting street, and the car had almost stopped at the crossing when he stepped off the east side of the rear platform where he had been standing, and proceeded to cross westwardly behind his car over the tracks to the opposite side of the street; but, just as he stepped beyond the track over which he had come to the adjoining parallel track, he was struck and severely injured by a southbound car coming rapidly upon the latter track.

The case upon the facts is substantially identical with that of *Street Railway v. Snell*, 54 O. S., 197, in which the trial court is reversed for directing a verdict. Snell had alighted from an eastbound car when it had slackened its speed for him as it approached a crossing; he got off at the south side and passed behind the car northwardly; and, as he neared the south rail of the west bound track was struck by a car coming west. The court says:

"At the same time while crossing he looked both east and west along the track, but the precise point from which he looked is not clear."

The case is also substantially similar upon its facts to that of *Cleveland Electric Railway Company v. Wadsworth*, 1 C. C.—N. S., 483, in which the trial judge is reversed because he did not direct a verdict. As in the Snell case the passenger got off as the car slowed up at a crossing, going eastward; passed to the rear of his car northwardly across the street; and was about to step upon the south rail of the adjoining trackway when he saw

and was struck by a westbound car whose headlight was brightly burning (it being at night).

The latter case was affirmed without report by the Supreme Court in 70 O. S., 432; so that our inquiry as to the governing rule should be narrowed to a comparison of these two cases which indicate the extremes between which it lies. But the flexible character of the rule is shown by the contrary results of these two cases in this, namely: the rule as announced in the fourth syllabus of the Snell case is, that where the question of contributory negligence "depends upon facts from which different minds might draw different conclusions," it is for the jury. The action in the Snell case was consistent with this principle because the court, taking a different view from that of the trial judge, upon the facts, gave effect to the principle by reversing the action of the judge below and sending the case to a jury. But in the Wadsworth case the difference of view of judges upon the facts seems to have produced an opposite result.

The contrary character of these results justifies, if it does not require, a re-examination of the legal relations involved in such cases.

It is manifestly the purpose of the Supreme Court, in the Snell case, to formulate an approximation to governing rules consistent with the primary holding that the rights of a street railway company operating cars over the streets of a municipality are neither higher nor different in kind from those of the ordinary citizen. And it is very essential to keep this in mind; for, in this respect, the duties and obligations relating to steam railroads rest upon quite a different legal basis, and precedents and rules drawn from such cases do not ordinarily apply.

The rule of the Snell case is, that those who pass across a street railway at a street crossing are held to the exercise of ordinary care only—"such care as might reasonably be expected of persons of ordinary prudence." Moreover, they are not required to anticipate negligence on the part of those operating cars; and while they should use their faculties of perception for their own protection, yet, "it is not necessarily negligent to fail to look in both directions for the approach of a car, but this depends upon the circumstances."

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In view of the facts of the Snell case which called forth these suggestions, and of the character of the court's action thereon, the meaning of the above holding seems to be that while a party is required to use his faculties of seeing and hearing reasonably to avoid danger, yet the circumstances may be such that, through no fault of his own, he might not by so using them perceive danger in time to avoid it.

In dealing with the facts in this class of cases it must be remembered that a party crossing the street behind a street car, is, while at the precise place where his faculties should be exercised, cut off by the presence and position of the car behind which he is passing, from seeing—and to a great extent from hearing—an approaching car on the parallel track. When the party injured is a passenger, just alighted from a car at a crossing, it is at least a circumstance to be considered, whether under his right to presume that the company will exercise due care to protect him from danger from their own cars, their failure to warn him at a place where they themselves have interposed an obstacle to the exercise of his own faculties of observation, is not such an assurance of safety as may excuse him.

On this point the opinion in the Snell case speaks with no uncertain sound. The court say (page 206):

“In this case there was a total disregard of plaintiff's rights—a clear case of gross, culpable negligence. The company owed to the passenger who had just alighted the duty of permitting him to cross from its car to the opposite side of the street without peril of his life or limb from the acts of the company; instead of which it sent its car down the grade at a breakneck speed without giving any warning or taking any pains to avoid running him down.”

Let us see what the conditions in such a case really are. The space between adjacent trackways in this city is about three and a half feet. As a car projects laterally beyond its trackway something over a foot, the space between cars in passing is about twelve inches. To a person crossing behind a car the view ahead upon the other track is confined to a very few feet until he has passed beyond the actual path of travel of his car—

that is, the view is cut off by the car from which he has just alighted. But, as a man walking covers about three feet at a step, a single step beyond the outer line of the standing car carries him into the path of danger of the approaching car on the next track. The significance of these facts appears when we consider the results of speed of cars in the same direction.

A car traveling at ten miles per hour covers about fifteen feet in one second of time; at fifteen miles per hour, twenty-two feet in one second; and at twenty miles per hour about twenty-nine feet in one second. While a man is taking one step of three feet therefore the approaching car is traveling fifteen, twenty-two, or twenty-nine feet in the same time, according to the speed suggested. It will be obvious therefore that there is little chance for safety for one crossing a street behind a car at a crossing as against a car coming in the opposite direction upon an adjacent trackway at a speed of ten to twenty miles an hour, unless the pedestrian stops still behind the standing car and cranes his neck forward to see beyond it, being careful not to place his head beyond the neutral space of twelve inches between the paths of passing cars at the risk of losing it.

But the Snell case repudiates the doctrine requiring a pedestrian to stop, look and listen, before crossing an electric railway, upon the theory that the right of operating cars in the streets is subservient to the equal rights of the public for passage along the street. The figure used for illustration by the court evidently intended to show its impracticability, is that of a man "sitting on a bank waiting for a stream to run by", and they say that the rule for street cars is the same as for ordinary vehicles, and add (page 209) that one crossing a street can not be required "to extend his observation beyond that distance within which a car proceeding at a customary and reasonably safe speed would threaten his safety."

It seems to us a fair and logical deduction therefore from the observations and reasoning of the Snell case that because of the peculiar danger to which a passenger alighting from a street car is exposed in passing behind the car to cross over the street,

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the measure of care required of the operating company is to be greatly enlarged, and indeed it may fairly owe him the degree of care due a passenger until he is out of the range of peril from the cars. It also follows that as the measure of care is enlarged for the company it is diminished for the passenger to the extent that he is by force of circumstances obliged to rely upon the company for protection by ample warnings and slackened speed of cars, because the company has placed an obstacle in the way whereby he is prevented from exercising his faculties as he might otherwise do for his own protection.

In the case at bar the speed of the oncoming car is variously estimated. The plaintiff avers that he was looking and listening as he passed to the rear of his own car and saw the approaching car at a distance of twelve or fourteen feet, but coming so rapidly he could not avoid collision. The case at bar strikingly illustrates the conditions to which we have referred and which are inherent in this class of cases. The testimony of plaintiff—corroborated to some extent, at least, by others—is that he did use his faculties for seeing and hearing, but he heard no signal nor warning of any kind, and could not see along the southbound track because of the presence of the car on which he had been riding, until he passed it, and then the down car came upon him so suddenly he could not escape. His language describes the situation with accuracy. He says he “went forward looking and listening”—“listening for the gong”—“listening for trouble sure, because there is generally trouble in lines like that”—“When I first seen the other car coming I was just stepping out, looking and stepping, and pressing forward.”

Asked where he saw the car coming south, he says: “No, you can’t see it on the same track the other car is on”; “you can’t see it”; “it is impossible to see it until you pass” (meaning evidently, that from the track over which he had come he could not see the other car because of the presence of his car). And again: “I could have got out of the way if it wasn’t going so swift.”

There was, as might have been expected in a case three years old, more or less variation in testimony in detail as to the speed

of the southbound car; whether and just where a gong was sounded, if at all; whether the conductor gave any verbal warning, and when, if at all, etc.; but the preponderance of the testimony, oral and circumstantial, showed that the down car came at a high speed.

The motorman, who saw McBee about a car length away, says he instantly turned on sand to the tracks and operated the reverse. All this occurred north of the north crossing at Flint street. The consensus of testimony was that when the car came to a stop it was entirely over and at least ten feet beyond the south crossing of Flint street, and the distance between the crossings is shown to be fifty-one feet and a fraction. It had run, therefore, on a sanded track on an up grade and reversed, a distance of fifty-one feet between the crossings, plus ten feet over, plus a car length of about twenty-five feet—a total of about eighty-six feet, plus whatever distance the car was above the north crossing, say ninety feet in all. There was no snow on the tracks, but the weather was cold, and as one or two witnesses expressed it, “drizzling, but not raining.” It is manifest, therefore, that the car must have been running at an unusually high speed; and if it was, as stated by McBee, only fourteen feet away when he reached the neutral twelve-inch space between the trackways, when he could see beyond his own car, it was upon him in less than a second of time, perhaps less than half a second of time, and gave him no chance to get out of the way by the exercise of any sort of care, ordinary or extraordinary.

The circuit court distinguishes the Wadsworth case from the Snell case on the ground that in the former the party injured had not his mind on his surroundings at the time of the injury, and hence did not use his faculties to avoid danger that he should have perceived. According to briefs of testimony in the opinion the court seems to have assumed that he was engrossed in other thoughts, and hence was negligent; whereas they say that the reverse was affirmed in the Snell case, because the plaintiff himself testified that he looked in both directions for an approaching car. By this test the case at bar falls distinctly within

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the terms of the Snell case, and as distinctly without the terms of the Wadsworth case. But we are not satisfied with such a test. A man may be excused for not suspecting danger which he can neither see nor hear because of the obstacle of the car from which he has just alighted, and because he relies and has a right to rely upon the presumption of due care on the part of the company proportioned to the circumstances, and also upon the absence of any direct warning from the conductor immediately charged with responsibility toward him as a passenger.

We think that contributory negligence should not be imputed to one injured under such circumstances as appear in this case—where palpable and gross negligence is shown on the part of the operating company. As the conditions are thus created by the nature of street car service and are inherent in the business, they can only be remedied by extra care on the part of the operating company in being held to an iron clad rule of utmost care in passing cars at street crossings and of ample warning to passengers alighting.

We find no error in the charge of the court, and from a careful consideration of the testimony we find no reason for disturbing the verdict. The charge of the court was fair, impartial and just, and we do not think the jury were in any way misled. The judgment, therefore, must be affirmed, and it is so ordered.

Outcalt & Foraker, for plaintiff in error.

Thomas L. Michie, for defendant in error.

MONEY PAID TO WRONG PARTY BY SAVINGS BANK.

[Common Pleas Court of Cuyahoga County.]

JACOB ANDERSON V. THE HOUGH AVENUE SAVINGS & BANKING COMPANY.

Decided, February 19, 1906.

Banks and Banking—Liability of Savings Bank—For Money Paid on a Stolen Book—Negligence of Depositor—Reasonableness of Bank's Rules—Questions for the Jury.

1. While a bank is not an insurer that it will never pay a deposit to the wrong person, it is bound to exercise reasonable care under the circumstances, notwithstanding any of its own rules to the contrary; and reasonable care on the part of a bank is a very high degree of care.
2. The fact that a young man earning wages every day, with no family to support, and in good health, should place his bank book in his trunk and not look for it again for nine months, does not constitute negligence as a matter of law.
3. Whether, the book having been stolen, the payment of the deposit to another constituted negligence on the part of the bank, is a question to be determined by the jury under all the circumstances of the case.

BEACOM, J.

Heard on motion.

The defendant objected to the introduction of any testimony under the pleadings. The opinion of the court on that motion was reserved.

Now at the conclusion of plaintiff's evidence defendant moves the court to direct a verdict for defendant.

It is undisputed that in 1903 the defendant was a savings bank company in the city of Cleveland; that in the summer of that year the plaintiff deposited in said bank \$61; that in October of that year one Christianson appeared at the bank with plaintiff's book and an order upon the bank for the payment to Christianson of the entire account, said order purporting to be signed by plaintiff; that defendant then paid to Christianson the entire account; that subsequently, about April, 1904, plaintiff

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appeared at the bank and demanded this money, claimed he had not signed the order, claimed that his bank book had been stolen. The bank refusing to make payment, plaintiff brings this action to recover the amount deposited.

It is not disputed as matter of law that plaintiff is bound by the rules of the bank.

The first rule I wish to consider is this:

“As the officers of the company may not be able to identify every depositor, the company will not be responsible for loss sustained where a depositor has not given notice of his or her book being stolen or lost, if such book be paid in whole or in part upon presentation.”

That raises the question whether or not the plaintiff contributed to this loss by his own want of care. Plaintiff says he took this book and put it away in a trunk, placing it within some book, and from the time of making this deposit until nine months thereafter he never saw the book. Two minds might differ on that subject. My personal opinion is that that does not constitute negligence on his part. There is nothing exceptional in that a young man earning wages every day, without family to support, in good health, should not have any occasion to look at his bank book during that time. Having no occasion to draw this money, it is not surprising that he should not have looked at the book for nine months. Therefore a court can not say as matter of law that he was negligent.

The next question has to do with the further rule of the bank that, “In all cases, a payment, upon presentation of a deposit book, shall be a discharge to the company for the amount so paid.” This rule is in its terms absolute, that, if the book is presented and the company pays out the money, the whole matter becomes then and thereby a closed incident. In other language, it means that a savings bank book is a piece of negotiable paper payable to bearer. Whosoever walks into a bank with it in his hands, if the bank sees fit to pay him because he has that book in his hands, then the bank is thereby released. Several courts of last resort have held that a bank can make such a rule, and that it is a binding and proper one. Others have held contra; that the rule is not absolute, that no one can con-

tract that he shall not be required to exercise reasonable care. The cases are considered, Am. & Eng. Ency. Law., Vol. 24, page 1262, *et seq.* No court in this state seems to have passed on the question. I have no hesitation as to what this court should declare the rule to be. It seems to me that the rule ought to be, that, while the bank is not an insurer that it will never pay to the wrong person, it is bound, any rule to the contrary notwithstanding, to exercise reasonable care in accordance with the circumstances. Reasonable care by a bank is a very high degree of care. That such ought to be the rule is evidenced by the manner in which banks ordinarily act about making payments. No one can ordinarily walk into a bank and get money easily. The ordinary manner in which banks are managed is one of great carefulness, and banks do not ordinarily pay to a person simply because he brings in a book, if he be not known to any one in the bank, and if there be not some circumstance, beyond the mere presenting of the book, which indicates that he is entitled to the money. We would have to keep our bank deposit books locked in safety vaults were it not for this carefulness. It is clearly not the rule that a bank may fail to exercise ordinary care and rely absolutely on the rule.

That leaves nothing for the court to speak of but this: Could there be two opinions about whether or not the bank had exercised reasonable care in the payment of this money. If it be clear that the bank did exercise reasonable care, if no two minds could differ on that subject, then it becomes a matter for the court. I can not say that. It being a matter that people may differ about, the question of whether or not the bank exercised ordinary care in paying out the money must be submitted to the jury. Manifestly, it is not a question for the court to pass on. The issue will be submitted to the jury to say whether or not the plaintiff contributed to this loss by his failure to exercise reasonable care to notify the bank of the loss of his book, and also whether, if he did not so contribute, this bank did exercise reasonable care in paying out this money.

Motion overruled. Defendant excepts.

Herman J. Nord, for plaintiff.

White, Johnson, McCaslin & Cannon, for defendant.

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PAROL TESTIMONY VARYING A WRITTEN INSTRUMENT.

[Common Pleas Court of Cuyahoga County.]

JOHN HICKS v. ROBERT H. HICKS.

Decided, February 13, 1906.

Promissory Notes—Advancements—Parol Testimony Varying Written Agreement—Statute of Frauds—Words and Phrases—Authority of Decisions in Other States.

1. The decisions of courts in other states are not authority in the sense of that which is binding; but they should be consulted diligently and respectfully for enlightenment, and should be given great weight, or little weight, or no weight, according as their reasoning appeals to the judgment of the court considering the question.
2. Where the suit is on a promissory note set forth in the petition, and the averments of the answer if sustained by evidence would only tend to contradict and destroy the written contract therein embodied, an objection to the introduction of any evidence by the defendant under the pleadings should be sustained.

BEACOM, J.

Heard on motion for new trial.

The plaintiff, seventy-three years of age, brings this suit against the defendant, plaintiff's son, who lives apart from his father, having a family of his own. The action is upon a promissory note, which reads as follows:

"\$2,000.00.

CLEVELAND, Sep. 3, 1901.

"Two years after date I promise to pay to the order of John Hicks, two thousand dollars, at 1703 Cedar avenue. Value received at five per cent. interest, payable semi-annually.

"R. H. HICKS."

Defendant admits the execution of the note, but avers that he gave plaintiff the note merely to serve the purpose of a memorandum of the amount, and that it was expressly stipulated between them that the same was not to be collected, and that it was mutually agreed that said \$2,000 was to be an ad-

vancement and was not to be paid but was to be charged against defendant's interest in plaintiff's estate.

It is undisputed that plaintiff and defendant, both residents of Cleveland, in the summer of 1901 viewed a farm in Solon township, this county, with a view to purchasing the same; that on the 3d day of September, the day on which the note is dated, the owner of said farm and the parties hereto and other persons met at the house of plaintiff; that then and there the owner of said farm executed a deed of the same to defendant; that plaintiff paid the seller \$2,000 of the purchase money; that plaintiff's wife paid another thousand dollars thereof; that defendant secured the balance of the purchase money, \$2,500, the entire purchase price being \$5,500, by giving the seller his promissory note, secured by mortgage upon the land sold; that, subsequently, defendant sold said farm and paid said note so secured by mortgage; that the date upon the note is the date when the payments were made and the writings executed; and finally, there is no dispute but that defendant has paid plaintiff the interest stipulated in the note, and that the principal of said note has not been paid.

The case was submitted to a jury and a verdict rendered for defendant. Plaintiff, among other reasons, moves the court to grant a new trial, "because the verdict is not sustained by sufficient evidence."

The execution of the note having been admitted, the burden of proof is upon the defendant. In support of plaintiff's denial that, when he gave this \$2,000 to apply on purchase price of said farm he intended to make a gift thereof in the nature of an advancement; that is, a gift which would be charged against the interest of defendant in plaintiff's estate after his decease; we have the positive testimony of plaintiff that he never so intended, and never said he would do so, and never said that he had done so. There is also the fact of the regular payment of interest by the defendant, which is, however, not inconsistent with the defendant's claim. Finally, there is the undisputed writing, which reads, "Two years after date I promise to pay."

To maintain the burden of establishing the claim of defendant by evidence outweighing that of plaintiff there is the direct

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testimony of defendant. In addition there is evidence of two kinds: First, that plaintiff took an active interest in this purchase, and second, that he made subsequent declarations tending to support defendant's claim. As to the first, it is undisputed that plaintiff was active in the negotiations in relation to the purchase, but the uncontradicted evidence is that defendant valued highly the good judgment and large business experience of plaintiff and that he counseled with him and advised with him about most if not all of his important undertakings.

As to the second class of evidence, that is, evidence of subsequent declarations, that plaintiff had said that he had "given" defendant this money, the chief weight comes from the fact that the word "give" is alleged to have been used by plaintiff in speaking of it. This is, however, a word of broader meaning than simply to donate. Its most common use is where the thought of donation is not in mind. We say that one gave so much for something which he has purchased. It is often used in the sense of a mere transfer without any thought of making a gift. Moreover, the slight weight to be attached to this sort of evidence is illustrated in the case of the witness Sambrook, who says that in a conversation with plaintiff, the plaintiff said, "What do you think of Robert selling the farm I gave him?" and again, in the statement of plaintiff's daughter, who testified that plaintiff said to her, "You are jealous about my giving this farm to Robert." It is plain that if plaintiff ever used such language, it could not have been used in the sense of making a gift, for under the admitted facts he did not give this farm to Robert. The admitted facts are that this farm was deeded directly to Robert, and that \$1,000 of the purchase money was advanced by Robert's mother, and that \$2,500 of the purchase price was secured by Robert's note, that being secured by a mortgage on the land, and this note was subsequently paid by Robert. So that, even though it be true that the father intended to make a gift of this \$2,000 which was applied to the purchase of that land, it is manifestly not true that he ever gave Robert the farm. Moreover, all statements as to what the plaintiff may have said about this matter are affected by the well known infirmities of human memory, and most of these statements are

also affected by the self-interest of the witness, for they come chiefly from the defendant or from those nearly related to him or from those who had at the time of the trial similar matters in litigation with plaintiff.

The court is of opinion that the evidence offered by defendant to support the averment of his answer falls short of outweighing the direct denials of the plaintiff and the clear "I promise to pay" of the note.

It is admitted by defendant that under the rule laid down in *Medill v. Fitzgerald*, 15 C. C., 415, that, to establish the averment of the answer, that this promissory note was evidence of a gift, by a mere preponderance of the evidence, is not sufficient, but that it is obligatory upon the defendant to establish it by evidence "clear and convincing." The defendant has failed to establish this case by a preponderance of the evidence, and manifestly, if that be true, has failed to establish it by "clear and convincing" evidence.

This would dispose of this motion. The court desires, however, to pass upon another matter.

A new trial is sought on the ground "that the court erred in overruling plaintiff's objection to the introduction of any evidence by the defendant under the pleadings." Had it been necessary to pass upon that motion when made, the court would have granted it. Likewise when this same motion was renewed at the conclusion of the introduction of evidence, the court was disposed to grant it, but desired to pass upon this question at the latest time possible, and desired to have the benefit of the arguments of counsel, and an opportunity to make an independent examination of the cases and to have time for reflection upon this matter, so gravely important to the parties hereto.

It is elementary that a contract in writing can neither be added to nor varied nor contradicted by parol testimony. If its terms be obscure, that obscurity may be explained by proof of circumstances. In certain cases it has been held that evidence of an independent parol contract, not conflicting with the written contract, may be introduced, as in a case where a trust is thus engrafted upon a deed. But human language can not be

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plainer than is that of this promissory note: "Two years after date I promise to pay John Hicks." This certainly needs no explanation. Nor does the answer aver an independent contract. It makes averments that if supported by evidence would tend only to contradict and destroy the written contract set forth in the petition. To allow evidence to be introduced to maintain the averments of the answer, that the defendant did not promise to pay in two years and that he did not promise to pay at any time, but that when said written contract was made there was a parol stipulation that he should not pay in two years and that he should never pay, is to allow parol evidence to be introduced to contradict and destroy a written contract. A judge has constantly pressed upon his attention the necessity and the wisdom of holding firmly to the rule that writings can not be destroyed by parol testimony, tainted, as such testimony is, with the infirmities of human memory and the infirmities of human character. Never did our ancestors adopt wiser legislation than when they adopted the so-called statute of frauds, providing that certain contracts could be made only in writing, and they knew then, as we know now, that the adoption of such a law did tend to prevent fraud and perjury, and they so named this law. Every modification and weakening of the firm rule that a written instrument is itself alone the conclusive evidence of the intention of the parties, simply tends to put a premium upon fraud and perjury. As ability to write becomes more common and universal courts should extend the scope of these laws rather than curtail it.

There is a class of cases to which 15 C. C., 415, *supra*, belongs, where it has been permitted, after the death of the ancestor, in the settlement of an estate to introduce parol testimony to show that a promissory note was intended as an advancement. Those are not the facts of this case, and if they were this court would follow these decisions unwillingly.

These are but two cases within my knowledge in which questions similar to those involved in this present case have been raised. One is *Brooks v. Latimer*, 44 Kan., 431, the other *Weaver v. Fries*, 85 Ill., 356. The first is in favor of defend-

ant herein, the second adverse thereto. In the Kansas case it is said:

“We do not deem the admission of evidence tending to show that a promissory note absolute by its express terms is a mere evidence of an advancement by a parent to a child to be in violation of that rule of evidence that forbids a written instrument to be varied by parol. This court is unusually liberal in the application of the rule that permits such inquiry.”

The facts of the Illinois case are substantially those of the case at bar, and it was held on general demurrer “that the plea presented no defense, as it only set up a contemporaneous parol agreement different from the tenor of the note. The terms of the written contract can not be varied or changed by parol.”

These decisions are in direct conflict, the court of higher reputation holding as this court holds in this present case. If, however, they were both adverse thereto, I should refuse to follow them, for any theory that tends to weaken the rule that a written contract can not be contradicted or destroyed by parol testimony seems so vicious and so wrong that I would not accept it from any court other than the two courts immediately superior to this one. The decisions of no other court constitutes an authority in the sense of that which is binding. They should be consulted diligently and respectfully for enlightenment and should be given great weight or little weight or no weight according as their reasoning appeals to the judgment of the court considering the question, for in the end it is the duty of a court to give its own best judgment and to be bound by no opinion in conflict with its sense of what is good law, unless that decision has been rendered by a court directly superior to it. Motion for new trial granted.

Brady & Cashman, for plaintiff.

T. H. Johnson, for defendant.

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SECONDARY LIABILITY OF STOCKHOLDERS.

[Superior Court of Cincinnati, Special Term.]

GEORGE W. HARRIS V. THE C., H. & D. RY. CO. ET AL.

Decided, February 13, 1906.

Corporations—Indebtedness of—Stockholders' Liability Therefor—Corporate Property the Primary Fund for Payment Thereof—Action to Enforce Double Liability—Not Available to Holder of Bonds not Reduced to Judgment.

1. It is well established that the secondary liability of stockholders as guarantors of the corporate debts to the extent of their statutory liability can not be enforced, except upon a claim against the corporation which has been reduced to judgment and execution returned *nulla bona*.
2. Neither this rule nor the exception thereunder, which saves the holder of a meritorious claim from unnecessary and perhaps fatal delay, permits the insolvency of an incorporated company being pleaded by the holder of a bond of one of the constituent companies, and not yet due, as a ground for enforcing the double liability of the stockholders.

HOSEA, J.

Heard on demurrer to petition.

Plaintiff sues as the holder of a bond of defendant, payable in 1942, in the sum of \$1,000, issued by a constituent corporation of the present defendant company, whose liabilities, it is alleged, were assumed by the defendant company in the consolidation.

The special ground of the petition—which is a general creditor's bill to enforce the double liability of stockholders—is thus stated:

“Said defendant * * * company, is insolvent and has been insolvent for several months past, and in cause No. — of the Circuit Court of the United States * * * admitted its insolvency, and thereupon in said action a receiver was appointed for such reason.”

Ancillary to the purpose of the suit stated are allegations and a prayer for the discovery of the names of all stockholders from 1895.

The general rule, in Ohio, as elsewhere, is that a suit of this nature to subject stockholders to their double liability can only

be brought upon a claim against the corporation reduced to judgment and execution returned *nulla bona*. This rule is so well established as to render it unnecessary to cite authorities.

It is not an arbitrary rule but is the logical deduction from the legal facts of the situation. The corporation is the principal debtor and the stockholder is only secondarily liable as a guarantor to the extent of his statutory liability. The corporate property is the primary fund for payment of the corporate debts, and the statutory liability of the stockholder is a security to be resorted to only where payment of debts can not be enforced against its property. In a word, the security is, to all intents, an equitable asset; and the suit to subject is in the nature of a proceeding in aid of execution—a supplementary proceeding.

While this is the rule, courts of equity recognize exceptions, and, in certain cases, uphold the right to sue without requiring a reduction of the claim to judgment, where the corporation itself is actually in process of liquidation—as upon dissolution or bankruptcy proceedings. This obviously just exception is in accordance with the principle that a court of equity will not insist upon requirements that are vain, where it is clearly necessary for the protection of a meritorious claim to prevent unnecessary and perhaps fatal delays. These principles are recognized in this state as the basis of the law enforced in its courts. *Hays v. New Balt. Turnpike Co.*, 1 Handy, 281; *Pratt v. St. Clair*, 6 O., 277; *Bamberger v. Tanner*, 13 O. S., 263; *Barrick v. Gifford*, 47 O. S., 184; *Bronson v. Schneider*, 49 O. S., 438; *Younglove v. Lime Co.*, 49 O. S., 663; *Kulp v. Fleming*, 65 O. S., 338.

The petition in this case fails to state a case for the enforcement of this secondary liability of stockholders. The plaintiff's claim is not due, and moreover the allegations raise a strong presumption that his bond represents a debt fully secured upon the corporate property; and it is therefore fairly inferable that he became a creditor of the corporation, not in reliance upon the credit of the corporation and the guaranty of the stockholder, but upon the immediate and direct security by way of mortgage which thus set apart the corporate property as his specific security. But even if the bond is not secured by mort-

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gage, equity secures it by raising an equitable lien superior to all subsequent claims except as against a subsequent innocent purchaser for value paid, without notice: and this lien is good even as against a subsequent mortgage. *Compton v. Railway Co.*, 45 O. S., 592.

The obvious purpose of the law of double liability is to give general creditors who deal with the corporation upon the faith only of a general creditor's claim upon the corporate property in the ordinary course of business, an additional security which tends to promote good faith on the part of corporate officers by making it to the interest of stockholders to see to it that good faith is observed. On principle, therefore, a creditor who deals at arm's length and secures himself at the expense of general creditors by mortgage upon the corporate property should not be entitled to the guaranty afforded by the double liability of stockholders, unless—in analogy to this principle of the bankruptcy law—he places himself in the situation of a general creditor by surrendering his special security, or at least until and to the extent that he is able to show that his security is inadequate.

The only allegation in the petition here is that the consolidated company—not the mortgagor—is insolvent. But this is not sufficient to make the case an exception to the general rule first stated. The insolvency and the receivership referred to in the cases upholding the exceptions to the rule, are conditions, such as dissolution proceedings, bankruptcy, etc., which necessitate a winding up and general liquidation of the company's affairs. In Ohio this is made clear in many cases and it is necessary to refer only to the two cases reported in 49 O. S., *supra*.

In *Bronson v. Schneider* (p. 438 *et seq.*), the general rule and the exception are clearly discussed, and the right of action to enforce double liability is held to arise only when—

* * * “the property is by some legal proceeding put in process of application to the payment of its (the corporation's) debts so as to render a judgment against it impossible or nugatory, as where the corporation is dissolved or thrown into bankruptcy, or placed in the hands of a receiver or has assigned for the benefit of creditors.”

In this statement the illustrations must be held to conform to the thing illustrated and consequently the receivership indicated must be one involved in some winding up proceeding where the property is "put in process of application to payment of debts."

But this is placed in a clearer light in the case of *Younglove v. Lime Co.* (p. 663), *supra*, where, on page 666, the court is at some pains to illustrate the distinction by reference to a receivership in that case as one *not* made because of insolvency necessitating a winding up of its affairs, and by way of antithesis, says:

"Any inference that his appointment was for the cause or purpose named is inconsistent with the fact that for nearly three years he carried on the business of the company under the direction of the court and then, by its order, restored the property to the company."

On page 667 the court further says:

"The creditor's right of action against the stockholders does not accrue when the corporation becomes insolvent merely in the sense that its property is insufficient for the payment of its liabilities."

The above citations do not exhaust the list of Ohio cases bearing upon the subject and declaring the same principles.

There is, however, a farther principle involved, arising out of the fact that the defendant here is not the debtor but the successor in title of the debtor under the railroad consolidation act. The petition shows that the consolidation was effected after the bond in question was issued and claims the right to sue by reason of the alleged insolvency, not of the original debtor, but of the consolidated successor. The statute, indeed, casts upon the consolidated company the liabilities of its constituents, but provides that all rights of creditors and all liens upon the property of either such companies shall be preserved unimpaired (Section 3384, Revised Statutes). What is sought to be enforced in this case is a secondary liability, not of the original stockholders, but of individual stockholders of the consolidated company.

This suggests another objection, namely: An allegation of the insolvency of the new company *per se*, would not neces-

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sarily imply the insolvency of the original company. The original company is "deemed to be in existence" to preserve the rights of creditors (Section 3384, Revised Statutes). *Non constat* but that the old company may be entirely solvent even while the consolidated company may be "hopelessly insolvent by reason of the debts of the other companies." *Compton v. Railway Co.*, 45 O. S., 592 (618-20).

For these reasons, and others not necessary to elaborate, the petition in this case seems to me to be defective, and the demurrer must be sustained.

Burch & Johnson, for plaintiff.

Edward Colston and Lawrence Maxwell, for defendants.

PUBLICATION OF COUNTY COMMISSIONERS' FINANCIAL REPORT.

[Common Pleas Court of Darke County.]

A. T. KNORR v. DARKE COUNTY.

Decided, December, 1905.

County Commissioners—Annual Financial Report of—Publisher Entitled to Price and a Half, When—Compliance with Section 917—And with Section 4366—Report of Examining Committee—No Requirement that it be Published in Tabular Form.

1. The annual financial report of the county commissioners made up and published in two columns, one consisting of the names of the persons to whom the items are paid and the purposes for which the items are paid, and the other consisting of the amounts in figures of each payment, separated from the column of words by sufficient blank space to make each column distinct to the eye, is a fair compliance with Section 917 of the Revised Statutes providing for such report.
2. Such publication so made and with leaders and two or more justifications is tabular work within the meaning of Section 4366, and in the absence of a special contract the publisher is entitled to the price and a half rate therein prescribed.
3. The report of the examining committee appointed by the court to examine such report is not required to be made up or published in tabular form, and should be paid for only at the one-price rate.

ALLREAD, J.

This is an appeal from the allowance of the county commissioners for the publication of the annual report of the commissioners and of the report of the examining committee.

The plaintiff is the publisher of the German newspaper, having, as he claims, the necessary circulation to entitle him to make such publication, and made the publication by authority of the board of commissioners. The circulation of the plaintiff's newspaper and his authority from the commissioners and his publication of the reports are undisputed. The sole question presented for consideration is as to the rate or price. The commissioners have allowed him for the publication the rate provided for by statute for straight work, while the publisher claims to be entitled to the additional rate allowed for tabular or rule work. The form of the publication of the commissioners' annual report consists of two columns, one containing in separate items the name of the person to whom paid and the purpose, the other the amount of the payment in figures; and separated from each other by sufficient space to make each distinct to the eye.

Section 917 requires the commissioners to make "a detailed report in writing, itemized as to amount, to whom paid and for what purpose, * * * of the financial transactions of the county during the year preceding the time of making such report;" which report "shall be published annually in compact form one time in two newspapers of different parties," and also "in one newspaper of the German language having a bona fide circulation of not less than 600, if there be such paper and in general circulation among the inhabitants speaking that language in the county, in the same manner."

The form of publication adopted conforms to the annual report itself and is a reasonable and fair compliance with the requirement of the statute just referred to.

The price for legal advertising is fixed by Section 4366, which provides that publishers of newspapers may charge and receive for the publication of advertisements, notices, and proclamations, the sum of one dollar per square for the first insertion, fifty cents for each additional, "and in advertisements containing tabular or ruled work an additional sum of fifty per cent. may be charged in addition to the foregoing rates."

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Is the publication of the commissioners' report tabular or rule work? Various printers testify that tabular work has a special signification in the printer's trade and comprises all work having two or more justifications, or in popular expressions, two or more columns with vertical alignments of type or form. But aside from this testimony, and independently, the court has consulted the standard dictionaries and lexicons. These authorities confirm the view that tabular or table work has special significance in the printing trade. Tabular or table work as applied to printing is thus defined by the Century Dictionary:

"In printing, the setting of tables; specifically, work done in such narrow columns, usually with figures, as call for extra compensation under an established scale."

"Table" is more elaborately defined by the same authority as follows:

"An arrangement of written words, numbers or signs, or the combination of them in a series of separate lines or columns; a formation of details in relation to any subject arranged in horizontal, perpendicular, or some other definite order in such manner that the several particulars exhibited to the eye each by itself; as, chronological tables, astronomical tables, tables of weights or measures, multiplication tables, insurance tables."

From this definition it will be observed that tabular work is not confined exclusively to columns of figures, although one or more columns of figures usually constitute a part of tabular work, as applied in the printing trade. In most of the tables referred to, and particular reference may be called to a chronological table, one column is devoted to explanatory works and one or more to the columns of figures. Nor is extra compensation the test of what is regarded tabular work, but follows as the incident. The classification is mechanical, depending upon the form and composition of the work, and the increased cost results from the additional justification of forms made necessary in composition of this kind. So that in determining what is tabular work, the mechanical form of the work itself is made the test.

The identical question arising in an appeal from an order of the commissioners making an allowance to a publisher of an annual report in Auglaize county was decided by Judge Mathers in the case of *W. J. Murray v. Auglaize County*, 1 N. P.—N. S., 89. The commissioners' report was there held to be tabular mat-

ter entitling the publisher to the increased price provided for. His summary is thus stated:

“Matters set up in the form of a table with figures or words one under the other so as to exhibit to the eye the information to be conveyed, and which contains two or more justifications, is tabular matter.”

Also the judge adds in the opinion, on page 90:

“While the regulation in fixing the price to be charged for such matter may have been originally governed by considerations of cost to the publisher in having it set up, still it will readily be seen that it is not the criterion by which the Legislature has authorized publishers to charge.”

No adjudication has been found by either counsel or the court to the contrary, and this decision is in line with the construction adopted generally by public officers since the passage of the act fixing the legal rate for advertisements passed in 1876. The decision of Judge Mathers in the case referred to is well considered and, in the opinion of this court, sound. Confirmatory of this view and as an illustration of the character of table-work is the table of cases so styled found in each volume of the reports of the Supreme Court printed under the direction of that court. In one column is found the title of the case in one or more lines, and in an independent column are figures showing the page where the case may be found. These tables are similar in mechanical construction to the commissioners' report. Still further confirmation of this view and an illustration of table work is afforded in the appendix of the printed volume containing session laws, containing the acts of the Legislature for the year of the adoption of the original act fixing legal rates for advertising, printed and appended thereto by a resolution of that Legislature (see Vol. 73, O. L.). This may well be considered as a contemporaneous construction made by the same General Assembly.

That the commissioners annual report is an advertisement within the meaning of this act, was decided by Judge Mathers in the case referred to, and that conclusion is sound.

It may be claimed that the phrase “tabular or ruled work” must be read together as one class of work comprising the essential features of both. This is not a natural interpretation, and

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by referring to the standard works we find that tabular and rule work in the printing trade apply to distinct classes of work, and that each class of work at the time of the passage of the act called for increased compensation over straight work. The court, therefore, is required to accept a natural reading of the statutes, and hold that either tabular or ruled work falls within the provision calling for increased rate.

Again it may be claimed that the phrase "may be charged" used in reference to the increase of fifty per cent. is discretionary with the commissioners to allow or disallow the additional charge. This question is not without difficulty, and its determination must be arrived at from a consideration of the entire act. The original act (73 O. L., page 75) is entitled, "An act to fix the price of legal advertising." The first section provides that publishers "shall be allowed to charge and entitled to receive" certain sums; with the stipulation that in advertisements containing tabular or ruled work "an additional sum of fifty per cent. may be charged in addition to the before mentioned rates." The codification changed the phraseology but not the meaning. It is clear, therefore, that the purpose of the act was to fix definitely, in the absence of a previous contract, the legal rate of advertising so far as straight matter is concerned. Now as to the tabular work, it is provided that an additional sum of fifty per cent. "may be charged." This language is not so positive. But what is its fair interpretation? "May be charged" is not synonymous with "may be allowed," for in the latter a discretion would be awarded to the commissioners, they having jurisdiction to allow. But "may be charged" naturally awards the discretion to the publisher and not to the commissioners. Previous to the passage of this act prices of advertising were fixed by the officer or officers authorized to allow the bill. By this act the Legislature fixed the rate, and its purpose is sufficiently apparent on the face of the act itself. It is competent for the state through the Legislature to fix the price of public service. This is exemplified by the salary of public officers and in the compensation allowed to appraisers, surveyors, chainmen and the like. The statutory rate is the legal compensation to which the publisher is entitled for the services rendered, at least in the absence of a contract.

An instructive case on this subject is that of *Campbell, Adm'r, v. McCormick, Adm'r*, 1 C. C., 504, where the question as to whether the amount of the allowance of an administrator for the regular compensation of six per cent. on the first thousand, etc., was discretionary with the probate judge or was an absolute right of the administrator. In that statute the phrase "may be allowed" is used in reference to the regular compensation of the administrator, but it was held that in connection with the other provisions of the statute the regular allowance to the administrator can not be reduced by the probate judge but must be allowed. If this is a correct interpretation of the law fixing the rate of compensation for an administrator where the phrase "may be allowed" is used, by a much stronger reason is the court required to construe the clause "may be charged" in this statute as fixing an absolute rule of compensation.

It may be added that the court in this case is not called upon to determine as to the reasonableness of the price or compensation fixed. It is presumed conclusively, so far as the court is concerned, that the rate fixed was a reasonable one at the time the act was passed. It is not competent for the court to amend or repeal statutes. It has no other duty but to construe the statutes as they are written. If the price fixed by this statute is not a just one, it is for the Legislature to make the amendment.

The claim will be allowed, therefore, at the rate prescribed for tabular work so far as the commissioners' report is concerned.

Now as to the report of the examining committee. The law does not justify the making of such reports in tabular form, but contemplates straight matter, and such reports, although part of it may be tabular, must all be paid for as straight work.

The allowance will be made on the basis of this opinion.

Anderson & Bowman, for plaintiff.

H. L. Yount, Prosecuting Attorney, for county.

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Fire Association v. Appel, Adm'r.

**APPRAISEMENT AS A BASIS FOR RECOVERY OF
FIRE LOSS.**

[Superior Court of Cincinnati, General Term.]

**THE FIRE ASSOCIATION OF PHILADELPHIA V. HARRY APPEL,
ADMINISTRATOR.**

Decided, January, 1906.

Fire Insurance—Ascertainment of Loss by Appraisal—Not a Prerequisite to Recovery. When—Refusal of Company's Appraiser to Act—Appraisal Completed without Him—Objections thereafter to Proofs of Loss not Well Taken.

1. The provision in an insurance contract for an appraisal in case of loss, is a matter relating to a mere detail of proof as to the amount to be recovered, and does not touch the fundamental right of recovery.
2. Where in pursuance of such a provision appraisers are duly appointed and proceed with the work, the power of the contracting parties in that behalf becomes *functus officio*; and the arbitrary withdrawal thereafter of the appraiser representing the insurance company, the refusal of the company to name a new appraiser, renders the appraisal condition impossible and relieves the assured of its performance, and does not give to the company the right to demand a re-submission, and the loss thereafter becomes a fact to be proved like any other fact.

HOSEA, J.; FERRIS, J., and HOFFHEIMER, J., concur.

This is one of a series of cases upon similar policies brought in the court below against various insurance companies, and by consent tried as one.

The Fire Association of Philadelphia, plaintiff in error herein, (and defendant below), together with the other insurance companies similarly situated, issued their respective policies of insurance to defendant in error's decedent, insuring her against loss and damage to her stock of millinery, etc., located in a building occupied by her in Cincinnati, Ohio. All the policies were of the New York standard form.

A fire occurred in said building on September 9, 1901, and the assured and the companies entered upon an adjustment of the loss. A difference arose and an appraisal was demanded by the companies under the terms of their policies, and an agree-

ment of submission duly entered into, and appraisers were duly selected by insurer and insured.

The appraisers selected an umpire and duly proceeded upon the determination of the sound value and loss under said submission, as provided in the policy; but after determining regularly as to about half of the stock (in value), the appraiser selected by the companies abandoned his duties and refused to resume, although requested to do so both by the plaintiff's decedent and the companies. There is no direct evidence of bad faith on the part of either appraisers, or on the part of either of the companies or the assured.

Upon the refusal of the appraiser selected by the insurers to continue to act, notice was given the companies and a request made of the companies to appoint another appraiser in his stead; but they insisted that they were entitled to an award under the original submission with both appraisers named in the same acting, or else to an entire new appraisalment with other appraisers to be selected by the parties. The assured declined to enter into a second submission.

Thereupon the appraiser for the assured and the umpire completed the estimate of the sound value and loss and returned same as an award, finding a sound value of \$11,491.97 and a loss of \$9,725.08.

Thereupon also the assured served "proofs of loss" on the companies, which were refused as not including a legal "award" by appraisers.

The insured having died, plaintiff, as her duly qualified administrator, brought suit upon the policies. His petition alleged performance of all the conditions of the policy "except such as were waived by this defendant as hereinafter stated," followed by an allegation of the facts above stated, and claiming that the action of the appraiser selected by the companies in refusing to complete the appraisalment was by instruction of the companies.

The defendants filed answer admitting the submission, the terms of the policy bearing on the same, the refusal of one of the appraisers to complete the appraisalment, and denying generally the other allegations of the petition, and alleging breach of the appraisalment clause.

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The cases were tried under stipulation on these issues before Hon. Rufus B. Smith (a jury having been waived). Before a decision was rendered, Judge Smith retired from the bench and the cause was submitted to him as referee on the testimony taken before him while on the bench.

The referee reported findings of fact and law, to the latter of which the companies duly excepted, as also to his overruling the motions for a new trial. The report was duly confirmed at special term and judgments entered thereon against the defendants. The defendants filed motions to set aside these judgments and for a new trial, which were overruled and exceptions duly taken.

No exceptions being taken to the findings of fact, the errors alleged as the grounds of these proceedings are in the conclusions of law found by the referee and sustained by the court, as follows:

(a). That upon the refusal of the appraiser selected by the companies to complete the appraisal and the refusal of the companies to appoint another in his place to complete it, the companies abandoned their right to an appraisal under the policy.

(b). That the appraisers selected by the assured and the umpire were justified in completing the appraisal without the assistance of the appraiser selected by the companies, as was done.

(c). That the companies were not entitled to a "new appraisalment" and therefore their objections to the proofs of loss were not well taken.

The legal difficulties created by the failure of the appraiser selected by the insurance companies to complete the work of appraisalment are resolvable upon elemental principles, as we think, by bringing into clear view at the outset the fact that the stipulation of the insurance contract here in question is one relating to a mere detail of proof as to the amount to be recovered and does not touch the fundamental right of recovery. Our highest judicial tribunal has declared that the constitutional right to appeal to the courts for a redress of wrongs is "inalienable and can not be thrown off or bargained away."

B. & O. Railway Company v. Stankerd, 56 O. St., 224; *Meyers v. Jenkins*, 63 O. St., 119.

This principle applies to stipulations of this nature in insurance contracts, which are upheld solely upon the ground that they prescribe only a mode of determining the loss and do not go to the right of action generally. *The Excelsior*, 123 U. S., 49; *Hamilton v. Ins. Co.*, 136 U. S., 242 (255); *Insurance Co. v. Carnahan*, 63 O. St., 258 (268).

In contracts involving stipulations of performance, it is important, in determining the facts under the rule of substantial performance, to consider whether those things in which the plaintiff may fall short of strict and literal performance are vital and affect fundamental rights, or are incidental matters as to which legal excuse for non-performance will suffice. If the failure is in respect of mere incidental things, the modern rule of laxity is applicable. *Kane v. Stone Co.*, 39 O. St., 1 (11).

Illustrations of this are not wanting in insurance cases. Thus it has been held that where the surrender of a policy is made a condition precedent of obtaining a paid-up policy, the fact that the original policy has been stolen or lost and can not be surrendered, will not defeat the right of the assured upon compliance with all the other conditions. *Wilcox v. Assur. Soc'y*, 173 N. Y., 50.

A similar holding as to the right to change a beneficiary, where the former beneficiary refused to deliver up the policy, will be found in *Lahey v. Lahey*, 174 N. Y., 146.

The cases just cited apply, to specified conditions of a contract, the principle of discharge, by matter *in pais*, of a contract as an entirety, namely: that where performance is rendered impossible by events not fairly within the purview of the contract and that can not be assumed to have been within the contemplation of the parties, such event operates as a discharge. Paige on Contracts, Sec. 1363; *Stewart v. Stone*, 127 N. Y., 500.

In the Wilcox case (*supra*), the contention of the insurance company was that the insured, though unable to produce the original policy, could have delivered a receipt or release which would constitute a sufficient surrender of the policy: but the court said "*The condition does not in terms require anything of*

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that kind. What it does require is the surrender of the identical policy with a proper receipt indorsed thereon. All agree that compliance with this condition became impossible," and the judgment of the lower court was therefore reversed and the cause retained.

This, as will be seen, is tantamount to saying that where a contract stipulation touching incidental matters and not connected with the fundamental right of action, becomes impossible by causes not anticipated by the parties, the condition is discharged, and becomes *non est*, and the insured is legally excused from performance in that regard.

The facts of the present case—under the contention of the companies that they acted in entire good faith in the selection of their appraiser and should not be bound by his default—seems to make the application of the principle above stated peculiarly appropriate and fitting. The provision for arbitration is one for the benefit of the companies, and was sought to be enforced by them. Appraisers were properly selected; these chose their umpire; and the appraising board duly organized proceeded in due form half way through their work. The stipulation of the policy made no provision for any other appraisement; and, having selected the appraisers in good faith and these having duly organized, the power of the contracting parties in this regard was gone—they were *functus officio*. The arbitrary withdrawal of an appraiser therefore rendered that appraisement impossible, except by appointment of a new appraiser to act as a substitute. But this, although requested by the insured, was refused by the insurer.

Under some authorities a court would be justified in holding that a submission having been once entered into, it is not in the power of one of the arbitrators to annul or avoid the agreement by deserting his trust (Morse on Arbitration, p. 156), and that consequently the award, as rendered by the two remaining appraisers, was a true and legal award and complied with the condition of the contract. But the better reasoning, we think, is that the appraisement contemplated by the contract having been rendered impossible by events beyond the control of either party, the condition of the contract in that regard was discharged.

For the reasons given and upon the authorities cited above, we prefer to rest our decision here upon the latter ground, noting, however, the refusal of the companies to accept a qualified performance by the insured party.

The referee held that the refusal of the insurer to appoint a new appraiser to take the place of the one who abandoned his trust was, in effect, an abandonment of their right to an appraisal under the contract. We can not say that this is not a correct view, for it stands supported by good authority. A typical case of this character is that of *Bradshaw v. Insurance Co.*, 137 N. Y., 137, cited by plaintiff in error, where, under a similar provision of the policy, an appraisal in due form was set aside upon the ground that the appraiser selected by the insurer showed, by his conduct, that he was biased and partial to an extent prejudicing the result. The court said upon the evidence "a jury might say that he *abandoned his duties* as a disinterested appraiser." The reviewing court also upheld the trial court in *refusing* to charge that the "insurer was not bound by what its appraiser did or failed to do," because "*the failure of defendant's appraiser to do his duty was not to be taken advantage of by the defendant.*"

The reasoning of the case seems to be grounded upon the maxim that a man shall not profit by his own wrong, and upon the theory that the appraiser is so far the representative of the party who selects him, as to involve a principle of responsibility analogous to agency. Such, in one form of expression or another, is the principle of many of the decisions on this question. *Uhrig v. Ins. Co.*, 101 N. Y., 362; *Bishop v. Ins. Co.*, 130 N. Y., 388; *Brock v. Ins. Co.*, 102 Mich., 583; *McCullough v. Ins. Co.*, 113 Mo., 606; *Read et al v. Ins. Co.*, 103 Iowa., 307; *Niagara Ins. Co. v. Bishop*, 49 Ills. App., 383: same case affirmed in 154 Ills., 9; *Fisher v. Ins. Co.*, 95 Me., 486.

But that a second appraisalment can not be insisted on where the first fails through default of appraisers once properly selected is also held in many cases. See *Niagra Ins. Co. v. Bishop*, 154 Ills., 9; *Uhrig v. Ins. Co.*, (*supra*); *Ins. Co. v. Decker*, 98 Fed., 381; *Fisher v. Ins. Co.*, (*supra*); *Dunn & Co. v. Ins. Co.*, 8 N. P., 612 (affirmed by Supreme Court, 52 O. S., 639).

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While in some of the cases the principle of localized responsibility seems to be more strongly suggested by a default aggravated by conduct, yet this can hardly be properly said to affect the question of agency. It would seem more logical to base the action of the courts in those cases upon the principle that where of two innocent persons one must suffer, it shall be he whose act or default brought into existence the conditions of and thus made possible the injury to the other.

But, the result being correct, whether the road to the right or to the left be taken in reaching it is of secondary consequence; yet, except in cases where the act of the appraiser is such as to indicate culpable negligence in his selection, and thus justify a court in directly impugning the party concerned, it seems to us that the more satisfactory ground of decision is the discharge of the condition by unforeseen impossibility of performance. This view seems to be recognized with more or less distinctness in the following authorities in addition to those cited in the first instance: *Uhrig v. Ins. Co.*, 101 N. Y., 362 (366); *Brock v. Ins. Co.*, 102 Mich., 583; *McCullough v. Ins. Co.*, 113 Mo., 606 (618); *Pretzfelder v. Ins. Co.*, 116 N. C., 491 (496); *Ins. Co. v. Holking*, 115 Penn., 416; *Niagara Ins. Co. v. Bishop*, 49 Ills. App., 383 (386); *Ins. Co. v. Docker*, 98 Fed., 381.

The objection to the proof of loss as being unaccompanied by an award, falls with the rest. The defendants repudiated the award as actually made, consequently theirs was but a reiterated demand for a new and independent appraisal, to which, as already shown, the contract did not entitle them. This would have been even more irregular, under the contract, than the substitution of a new appraiser under proceedings actually begun. To concede the principle of this demand would, as suggested by the referee, open a door to fraudulent repetitions, to the hardship and defeat of those insured. Under the basic principle we have adopted as controlling this case, no award was necessary, because the condition was rendered impossible of performance. The loss then became a fact to be proved like any other fact.

The plaintiff below seems to have proceeded in such wise as to be prepared to meet the issue under either of the theories we

have indicated; but if the insurance companies having refused to proceed under the appraisement originally begun, and having subsequently repudiated the award as made—all upon the claim that the proceedings did not fulfill the terms of the policy—could hardly admit in more cogent terms the impossibility of performance by plaintiff, and they had no right to require a compliance with a substituted demand.

Whether these acts be construed as a waiver or abandonment of the condition, or as admissions of the impossibility of performance, is immaterial, since both lead to the same result, namely: They relieved the insured party from the necessity of performance of that condition; and the general performance which in other respects is conceded, must be accepted as a substantial performance of the contract as a whole.

We do not find in the Carnahan case in 63 O. St., 258, anything inconsistent with the view hereinbefore expressed. In that case the insured ignored entirely the arbitration condition and refused, even when demanded by the insurer, to abide by it. The court very properly held that since it was a condition of the policy, performance or a legal excuse for non-performance must be shown by the insured as a condition precedent to recovery: and that no legal excuse was shown.

There are, indeed, a few cases cited to us which hold that under certain circumstances it is incumbent on the insured to demand a new appointment of appraisers where the first arbitration fails, but those cases, when closely scanned, present some controlling facts such as the failure to select an umpire, etc., which clearly distinguish them as authorities. The clear weight of authority we find to be in favor of the general views we have stated; and the judgment of the court below is affirmed.

Judgment affirmed.

J. H. Cabell, J. L. Kohl, for plaintiff in error.

John R. Sayler, Frank Seinsheimer, for defendant in error.

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Haskell v. Beers et al.

NOTICE BY SURETY TO CREDITOR TO SUE.

[Common Pleas Court of Lorain County.]

J. T. HASKELL v. DELL P. BEERS AND F. E. WILDMAN.

Decided, January 13, 1906.

Principal and Surety—Demand by Surety for Suit by Creditor Against Principal—Not Complied with, When.

Where a surety on a note, in answer to a letter from the owner of the note requesting payment, writes "Please collect of Mr. Beers (the principal) all you can of this amount, and notify me, and I will arrange for the balance," and the owner of the note answers, suggesting that the surety see the principal and secure himself against loss, and the surety immediately replies, saying, "I will try and see Mr. Beers (the principal) soon; am very busy for a few days, and will report to you as soon as I can. Thanks for your suggestion," and nothing further is done by either party in reference to the matter—

Held: That that does not constitute a sufficient notice, according to the provisions of Revised Statutes, Section 5833, to relieve the surety, because of the neglect of the owner to bring suit on said note for six years after such correspondence.

WASHBURN, J.

A jury having been waived in this case, it was submitted to the court upon the evidence. It is an action brought upon a promissory note, signed by Dell P. Beers and F. E. Wildman, upon which Mr. Wildman was in fact surety, although that does not appear from the note itself.

After the note became due, it was placed by the owner in the hands of plaintiff, who is an attorney, for collection, and while so in his hands for collection, he wrote to the defendant, Wildman, as follows:

"WELLINGTON, Feb. 27th, 1895.

"F. E. WILDMAN, Esq.,

"West Clarksville, O.

"*Dear Sir:* I have placed in my hands for collection a note signed by Dell P. Beers and yourself for \$135.48 given Jan. 21, 1892, for 18 months, interest at seven per cent.

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"I am instructed to collect this note at once. Please let me hear from you, so if possible to avoid expense of litigation, and oblige.

"Note given to L. H. Wadsworth.

"Yours truly,

"J. T. HASKELL."

And in reply to said letter said Wildman wrote to said Haskell as follows, on March 2, 1895.

"In reply to your letter of February 27th, will say, I have written to R. M. Goodman in regard to this twice recently, and will say the same to you. Please collect of Mr. Beers all you can of this amount and notify me, and I will arrange for the balance."

To which last letter Haskell wrote the following answer on the 2d day of March, 1895:

"Yours received. I have written Mr. Beers in regard to the note; but have received no reply. If we do not hear from him, we will have to begin legal proceedings which will involve yourself as well as him, and if costs are made and collection can not be made from him, will have to be paid by yourself. I would suggest that you see Mr. Beers and get security from him on the note, and then you take care of it. You may be able to do this even though no collection can be made of him by law. Please let me hear from you at once (I write you this as law suits are apt to be expensive to some one) and oblige."

And on March 4th, Wildman replied to Haskell's letter of March 2d, and said:

"I will try and see Mr. Beers soon. Am very busy for a few days, and will report to you as soon as I can. Thanks for the suggestion."

No further correspondence or communication was had between the parties, and nothing was done by way of bringing suit to collect the note until 1903, when Mr. Haskell purchased the note from the owner and began this suit.

Mr. Wildman has answered, setting up that he was a surety on the note, and claiming that the above correspondence shows

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a notice to sue, according to the provisions of Section 5833, Revised Statutes, which, by reason of the failure to sue on said note within a reasonable time, has released him from his liability on the note as surety. No other defense is interposed or claimed. The statute reads:

“A person bound as surety in a written instrument for the payment of money * * * may, if a right of action accrues thereon, require his creditor, by notice in writing, to commence an action on such instrument forthwith against the principal debtor.”

And provides that unless such action is begun within a reasonable time, the surety shall be released.

It is claimed that the letter of Wildman of March 2, 1895, contains the notice required by this statute; the language is:

“Please collect of Mr. Beers all you can of this amount, and notify me, and I will arrange for the balance.”

Does this constitute sufficient notice, under the statute, to relieve the surety from liability on the note?

The notice in the 44th O. S., 430, was as follows:

“Yours of the 12th came to hand. If you hold any note, signed by C. M. Rider and ourselves, C. M. Rider is the principal and we are only his sureties, and we notify you to commence an action on the note forthwith and proceed to collect it. Rider is able to pay his own notes. Respectfully yours.”

That was held to be sufficient notice.

In the 41st O. S., 28, the notice was:

“You are hereby requested to commence action forthwith against Alexander McKee on the promissory note which you now hold against said Alexander McKee and signed by said McKee and also signed by Mr. William Clark, now deceased. Said McKee is principal debtor under said note, and said Clark was at the time of his death bound as surety.”

And that notice was held to be sufficient.

In the 40th O. S., page 101, the notice was:

"You are hereby required, at once, to proceed and collect the note you hold, dated the 17th of April, 1872, for \$178.50 upon which I am surety, and James Satterfield is principal; that I will stand no longer."

That notice was held sufficient.

In the 29th O. S., page 663, the notice was:

"I wish you would proceed against I. C. Nickols to collect that note on which I am bail, belonging to Mr. Brim's estate, or have it arranged for some way to release me, as I do not wish to remain his bail any longer."

That notice was held not to be sufficient.

In the 54 O. S., at page 155, the notice read:

"FINDLAY, OHIO, Dec. 16th, 1891.

"MR. C. E. NILES.

"*Dear Sir:* Unless you hear from us to the contrary by ten A. M. to-morrow, December 17th, 1891, we require you to take judgment on the D. J. McConnell note."

And that notice was held not sufficient.

From a reading of the above cases it is apparent that it is not necessary that the notice contain the exact language of the statute. It is sufficient if the notice substantially complies with the requirements of the statute. But the notice must contain the following essentials, to-wit:

- (1) It must be peremptory. It must "require" the
- (2) "Commencement of an action,"
- (3) "Forthwith."
- (4) It must be unconditional; and
- (5) It must not be misleading, but should be easily understood.

"You are hereby requested" is sufficient requirement, if the context shows it to be peremptory (41 O. S., at page 35).

But, "I wish you would proceed," etc., is not, in the absence of anything in the context to indicate a peremptory order (29 O. S., 664).

"Please collect of Mr. Beers all you can of this amount, and notify me and I will arrange for the balance," is rather more

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of a "wish" than a positive demand; but if it be sufficiently peremptory, it does not seem to me to require action "forthwith" within the meaning of the statute.

The Supreme Court say in the 54th O. S., on page 156—

"The notice should contain a peremptory requirement of the surety on the creditor to commence suit 'forthwith,' or some equivalent language."

In the case at bar there is nothing to indicate that the surety required the creditor to act without delay. The statute says "forthwith," and unless that term or some similar language, such as "at once" is used, to indicate that prompt action is demanded, or something in the notice shows it to be adversary, it is not sufficient, in my judgment.

In the notice in the 41st O. S., page 28, the word "forthwith" was used. That is true also of the notice in the 44th O. S., 430.

In the notice in the 40th O. S., 101, the creditor was required "at once to proceed," etc. And the notice ended with: "I will stand no longer." Which indicated that the notice was adversary.

The notice in the case at bar does not even state that Wildman was surety on the note, and from an inspection of the note that fact does not appear, and I do not think that the language of the notice indicates that it is adversary, or that it required action "forthwith" on the part of the creditor.

When the notice in this case is considered with all the correspondence which passed between the parties in reference to this matter, and which all occurred within a few days, it seems quite plain to me that it did not "require" the "commencement of an action" by the creditor "forthwith"; at least one would not easily understand it to so mean.

It is said in Boylies on Sureties and Guarantors, page 229, that:

"The direction must be clear and explicit, not liable to be misapprehended by the creditor, nor to be left to the court to grope after the meaning of the surety amongst ambiguous words."

Speaking of the notice required by this statute, the Supreme Court says: "A valid notice may be withdrawn." 41 O. S., at page 36.

To the same effect is Brandt on Suretyship, 2d Vol., 609. See also authorities there cited.

If the notice in this case was sufficient, I think this correspondence, fairly construed, was a withdrawal of the notice. At least, the whole correspondence shows the notice to be so qualified as not to be "unconditional" as is required by the statute (54 O. S., 155).

It is also claimed in this case that the notice is not sufficient, because it was not served upon the "creditor" as said statute requires; and that notice served upon the attorney of the creditor, in whose possession the note is, is not sufficient.

There are many authorities both ways on that proposition. But it is not necessary for me, in disposing of this case, to pass upon that question.

However, I am inclined to think that where a sufficient notice is served upon the attorney for the owner of the note, and it appears that the attorney then has the note in his possession, and that the attorney after having such notice purchases the note and brings suit upon it, that such notice, as against such attorney, would be sufficient.

Judgment for plaintiff.

A. V. Andrews, W. R. Prisner, for plaintiff.

E. G. & H. C. Johnson and C. P. & L. W. Wickham, for defendants.

JURISDICTION OF COMMON PLEAS IN ERROR.

[Common Pleas Court of Paulding County.]

H. FOUTS v. S. T. PRICE & COMPANY.*

Decided, February 2, 1906.

Error to Mayor's Court—Jurisdiction of Common Pleas—As to Errors of Fact not Appearing in the Record—Recourse Should be had to Correct the Record, When.

- 1 The common pleas court has jurisdiction, under Section 6708, to consider errors of fact not appearing on the record from the court below.
2. This jurisdiction is limited to facts of which the record may not be compelled to speak, and when the challenge is as to facts which should appear in the record, recourse should be had to correct the record in the court making it.

KILLITS, J.

Heard on error to mayor's court, in civil action; motion to dismiss petition in error.

Plaintiff in error, defendant below, prosecutes error claiming that judgment for money only was taken against him by default in the court below, upon a service of a summons, which he admits receiving, which was not endorsed, as he claims, with the amount for which judgment might be taken by default (Section 6475). The record shows that summons was duly served by copy, personally, but it is silent as to whether or not it was such as the statute required. Ordinarily, on error, we would be called upon to presume that all things required to be done to acquire jurisdiction were done, if the contrary did not appear by record, and we are compelled to and do hold that the record, as it is, sustains the judgment it recites. The original papers filed with the transcript contain a summons properly endorsed as to the amount claimed, for which judgment might be taken, and this original summons bears the return of the serving officer, showing that a true copy was served upon the plaintiff in error, personally. The plaintiff in error files a verified petition in error, setting up as an error in fact, not appearing on the rec-

*Affirmed by the Circuit Court, March 16, 1906.

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ord, that the original summons, when issued and served, did not contain the endorsement, and that the endorsement now appearing thereon was placed upon it after judgment was taken. Plaintiff in error contends that this assignment should be considered in this court, citing *Shreve v. Parrott*, 4 W. L. B., 39.

The cause comes to be heard upon a motion to dismiss. We are of the opinion that this motion should prevail. The record, especially when re-enforced by the original papers, shows that every jurisdictional fact was present when judgment was taken. This record speaks for itself, and can not be corrected in these proceedings. The place to challenge the correctness of the record is in the court making it. *Railway v. Wick*, 35 O. S., 247, 252.

While this court may consider errors of fact not appearing of record in the proceedings of the courts inferior to it, in this respect its jurisdiction in error, conferred by Section 6708, being broader than that of the circuit court under Section 6709 (*Shreve v. Parrot, supra*), we are of the opinion that only such facts *dehors* the record may be considered by this court as the record, properly made up, should not have disclosed, and that when the challenge is as to facts which the record, properly made, should have exhibited, such challenge should be first prosecuted to the court below for a correct record. As to the matter below, if plaintiff in error is right, the record is wrong, and the court making it should be first invoked for a true record. We can not presume that the court below would refuse to do its duty when its attention is called to a defect such as is alleged here.

In this case, plaintiff in error admits having received summons that an action of some kind was begun against him in the court below, and it was his duty to proceed in that court if he intended to complain as to the sufficiency of the notice.

The remaining assignments of error were not argued, but the court has considered them, and finds them to be harmless, and not prejudicial.

Motion to dismiss is sustained and petition in error dismissed, with judgment against plaintiff in error for costs. Exceptions by plaintiff in error.

John W. Zuber, for plaintiff in error.

Waters & Spriggs, for defendant in error.

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Schneider v. City of Cincinnati.

LIABILITY FOR SIDEWALK RENDERED SLIPPERY BY MUD.

[Superior Court of Cincinnati, Special Term.]

MARY SCHNEIDER V. CITY OF CINCINNATI.

Decided, October, 1905.

Sidewalk—Rendered Slippery by Mud Washing over It—Mistake of Judgment by City Officials—In Determining Character of Improvement to be Made—Creates no Liability Against the Municipality—But Liability Arises from Negligent Failure to Perform Duties Imposed—Notice, Actual and Constructive—Of Dangerous Condition of Walk—Presumption of Notice Arises, When—Contributory Negligence—In Going Upon Walk in Dangerous Condition.

1. While a municipality is liable for the negligent failure of its council or engineer with reference to the repair and keeping of a street or sidewalk open and safe, no liability attaches on account of errors of judgment on the part of these officers in the performance of these duties in good faith.
2. Where the dangerous character of an obstruction on the sidewalk is the gravamen of a petition for damages on account of injuries sustained in walking thereon, the testimony must establish that the city had notice actual or constructive of the dangerous condition of the walk in time to remedy it, and that the obstruction was one it was the city's duty to remove, and having received such notice it failed to remove it.
3. An allegation of notice does not under strict rules of pleading support proof of constructive notice, and constructive notice can not be based upon temporary conditions of recent operation.
4. Where it appears that a plaintiff had full knowledge that a walk had been rendered slippery by a hard rain washing mud upon it, yet took the dangerous way although it could have been easily avoided, contributory negligence is shown of a character warranting the court in taking the case from the jury.

John V. Campbell and Chas. W. Scott cited for the city on motion for non-suit:

Wheeler v. City, 19 O. St., p. 19, holds that powers conferred on municipal corporations, that are in their nature legislative and governmental, are to be governed in their exercise by the judgment and discretion of the proper municipal au-

thorities; and for any defect in the execution of such powers the corporation can not be held liable to individuals. *Conneaut v. Neaf*, 54 Ohio St., 529.

Circleville v. Sloan, 59 O. St., 285 (302): The question was whether city is liable for defect in execution of plea for local improvement. Contention was that the execution was exercise of a legislative power and that city was not liable for errors of judgment. The court finds that corporation is liable for injuries caused by dangerous defect or obstruction which it suffers to remain after reasonable notice of existence, even if it were in the construction or alteration of street or sidewalk according to plan adopted by municipality (306).

Dayton v. Taylor, Admr., 62 Ohio St., 11, holds that city is not liable respecting its errors of judgment in plan of a public improvement (19 Ohio State, p. 19, *Wheeler v. City*). But may be held liable for negligence in carrying out the plan, and if notice is brought home to municipality that, by reason of a faulty construction, the street is not reasonably safe for use under ordinary circumstances, it then becomes the unmistakable duty of the city to remedy the defect; and a failure to do so after such notice would make it liable (Cit. 59 Ohio St., 285).

Circleville v. Sohn, explaining 59 and 62 Ohio St.

Defect must render dangerous—33 Ohio St., 249.

City must have notice—44 Ohio St., 512.

Continuance of defect may be notice—44 Ohio St., 505; 46 Ohio St., 442; 68 Ohio St., 1.

Stepping stone in highway not an obstruction—*Dubois v. Kingston*, 102 N. Y., 219.

“Traveled path”—*Conneaut v. Neaf*, 54 Ohio St., 529.

HOSEA, J.

Heard on motion to direct a verdict.

This motion raises important questions and places upon the court the possible necessity of assuming a responsibility that a court would much prefer to leave with a jury; but it is the duty of the court to so act if the facts require it, and it is reversible error not to do so.

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The plaintiff's testimony shows that she lived in the immediate vicinity of the place of the accident, on the same side of the street, for about a year and a half prior thereto, and frequently passed over the sidewalk where the accident occurred. An alley comes down from a higher level at a uniform inclination, to the level of Hunt street with which it connects, and the curb of the alley, at the same inclination, meets the curb of Hunt street. The alley curb, starting at the sidewalk surface of Hunt street at the level of its outer edge or curb, inclines upward to a height of seven or eight inches above the sidewalk at the house line. The alley construction was made as a city improvement under direction and according to stakes set by the city engineer. Some earth had accumulated at the outer side of the alley curb in the angle formed with the sidewalk, and extended from the curb at about an inch below the curb surface to the sidewalk two and one half feet distant.

Plaintiff admits that she knew the exact condition, for she says it was that way all the time she lived there—just as it was at the time she was hurt, and that she had noticed the mud next to the curb, and again, that it was in about the same condition all the time.

In coming down Hunt street she crossed the alley and at the south side of it put her foot over the curb and upon the slanting mass of earth at the lower side. Her foot slipped and she fell. This occurred between 6 and 7 P. M. on October 12, 1901, while she was walking with a bundle in one hand and a bucket of hot coffee in the other. It was dark and it had rained all day and the earth where she placed her foot was muddy and soft and the earth where she stepped was, she says, three or four inches higher than the sidewalk beyond.

In every suit based upon personal injuries the burden is upon the plaintiff to prove negligence on the part of defendant as the direct cause of the injury; and if, in the endeavor to prove this, the plaintiff raises a presumption of contributory negligence on his own part, he has also the burden of overcoming this by proof. These propositions are so well established it is unnecessary to cite authorities.

(1). As to negligence of the city.

(a). So far as concerns the construction of the alley where it leads into Hunt street, it is shown to be in accordance with the plans of the city authorities and it is not claimed to be in a defective condition, or negligently constructed *per se*.

"In all such matters [quoting from Shearman & Redfield] the corporate authorities have a discretion to exercise; and, however unwise their judgment may turn out to have been, the corporation will not be liable in damage for the consequence of their un wisdom." 1 Shearman & Redfield on Negligence, par. 262; *Dayton v. Taylor's Adm'r*, 62 O. St., 11; *Wheeler v City*, 19 O., 19.

The underlying reason for this I apprehend to be that the council that adopts and the engineer who carries out the adopted plan, are the direct representatives and servants of the people who elect them for this purpose. So long, therefore, as they act in good faith their acts are the acts of the people themselves, and no liability attaches for errors of judgment. It is only for negligent failure to perform duties that the municipality is liable.

(b). It is the statutory duty of the city council to keep the streets and sidewalks "open, in repair, and free from nuisance" (Revised Statutes, Section 2640 [1902]); but the law exacts only what is practicable and reasonable in this regard. 44 O. St., 505 (516).

In the present case there is no question of repair or want of it; the case rests therefore upon the allegation of nuisance or unsafe and dangerous condition for ordinary purposes of travel. The unsafe and dangerous character of the obstruction is the gravamen of the position; for, if it did not render the sidewalk unsafe, there was not such negligence on the part of the city as would afford a ground of complaint.

(c). But, if a sidewalk is in a dangerous condition and this is alleged as a basis of liability against the city for its negligence in permitting it to exist, it must be made to appear (1) that the city had notice, actual or constructive, of the dangerous condition of the walk in time to remedy it; and (2) that,

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having such notice, it was the city's duty to remedy it, and that it failed to do so.

The petition in this case alleges notice. Under the strict rules of pleading this will not support proof of constructive notice—but the proof fails entirely to show actual notice and fails to show any such facts and circumstances as would, by the exercise of reasonable diligence, lead a prudent person to such knowledge.

Constructive notice by mere lapse of time during which a condition has existed, is based primarily upon the fact of a condition that is obviously unsafe and dangerous.

In *Chase v. City of Cleveland*, 44 O. St., 505, at page 515, Judge Spear uses language very pertinent in this connection. He says:

"Regarding the removal of dangers, as well as regarding watchfulness in ascertaining their existence, the municipality is bound to exercise only ordinary care—to take such measures as are reasonably required and adequate in view of ordinary exigencies. The condition of the walk in this case is not complained of as a defect in the sidewalk but rather an accumulation on it which created a nuisance. Those authorities are empowered to clear the streets from snow and filth and by ordinance require the property owners to keep the walks clear from snow and ice, but, ordinarily, liability does not attach for failure to do so. Slipperiness may arise from a variety of causes. A thin film of mud on a walk may often produce it, and yet liability would hardly be claimed to arise from such a cause. * * * *

"The law exacts from municipalities only that which is practicable and reasonable; * * * the duty of the municipality must be interpreted upon a reasonable basis in reference to the actual condition of affairs; impracticable things are not required; and to hold the city liable under the allegations of this petition would be to require that which is impracticable and to impose an onerous and unreasonable burden upon it."

That it is the notoriety of the dangerous and unsafe condition that constitutes the basis of the presumption of notice—as a condition so obvious as to force itself upon the attention of passers-by, and, by consequence, upon the city authorities—is

plainly indicated though not so directly set forth, in the case just cited; but it is clearly declared in many other cases.

Thus in *Todd v. Troy*, 61 N. Y., 506, it is said:

“When a defect has become notorious, and its officers have full opportunity to know of it, the municipality is chargeable with notice.”

Again, in 36 Barbour, 226, it is even more forcibly put, as follows:

“After a street has been out of repair so long that the defect has become known and notorious to those traveling the street, and there has been full opportunity for the municipality through its agents and officers to learn of its existence, notice may be presumed.” Substantially similar rulings occur in 44 Barb., 385; 49 Barb., 580; and in *Pomfrey v. Saratoga Springs*, 104 N. Y., 459.

But in this case there is no evidence whatever, except it be the fact that plaintiff fell there, that the walk at that point was defective or dangerous in any sense. Assuming the fact to be as stated, the condition complained of was manifestly caused—as stated by plaintiff—to the muddy and slippery condition caused by the all-day rain immediately preceding. It was therefore not a general or continuing condition, nor one necessarily to be expected from every rain. It is part of a sidewalk in a populous part of the city and the earth, it may be fairly inferred, was beaten hard by the feet of pedestrians, and under ordinary circumstances, would not be slippery. If, as stated in the testimony, it was muddy, soft, and slushy, this was manifestly the result of the prolonged rain of the day or more preceding. Its unsafe condition therefore was temporary only and from a cause so recent as may fairly bring the case within the principle laid down in *Village of Leipsic v. Gerdeman*, 68 O. St., 1, where it was held that constructive notice can not be based upon causes of a dangerous condition operating so recently as to preclude a reasonable presumption of notice.

The case cited is a clear exposition of the law and of the duty of a judge under such circumstances as are found in the present case.

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(2). Contributory negligence.

It happens not infrequently that, in detailing the acts and circumstances of an injury charged to the negligence of another, there is also shown a failure to exercise the care and caution required of the plaintiff in the action.

In this case it is manifest that the inclined bank of earth described, existed, practically, only very near the house line, because the alley curb sloped downward across the pavement toward Hunt street and the rise (assuming the pavement to be of a width of only ten or twelve feet, which is a low average) was less than an inch to the foot. At the central and outer portions of this cross-curbings there could have been no bank of earth to speak of.

The conditions were well known and familiar to the plaintiff. If rains tended to make this earth slippery this was a fact she as well knew, as an agent of the city could have known it. If, therefore, the condition was in fact dangerous, as she alleges, and presented an obstruction which the city was bound to remove, and it was negligence to leave unremoved, it must follow, since its character was known to plaintiff, that it was imprudence in her to pass over it or that, if she did pass over it, she did not use due care.

As is said in 44 O. St., 249, *Schaffer v. Sandusky*:

"The case * * * is not one where there is an obstruction not known to be perilous. In that class of cases, negligence can not be imputed to one who uses such carefulness as a person of ordinary prudence would exercise. But, where there is danger and the peril is known, whoever encounters it voluntarily and unnecessarily, can not be regarded as exercising ordinary prudence and therefore does so at his own risk." Citing *Durken v. City of Troy*, 61 Barb., 37, and other cases.

In the case at bar the plaintiff not only took the dangerous way where it could have been avoided by passing nearer the curb line of Hunt street, but did so with both hands occupied with things carried, whereby she was deprived of the assistance which might have avoided serious injury, even under the circumstances of the fall, if her hands had been free.

The same principle is applied by Judge Shauck in the case of *The Village of Conneaut v. Neaf*, 54 O. St., 530-31.

The fact that the evening was dark only emphasized the requirement of care on the part of plaintiff and makes the absence of care more apparent.

The case—as was said in *R. R. Co. v. McClellan*, 69 O. St., 157—is not one which presents a conflict in the evidence on any vital points. “The rule is that, whether or not there is evidence tending to prove an essential fact, is a question for the court; and if it be determined that there is not, then there can be no conflict and there is no question for the jury.”

In the case cited it is held to be error for the court to refuse to sustain a motion where the facts are as stated..

On this ground also the motion is granted.

Motion to direct a verdict sustained and verdict directed.

F. M. Coppock, for plaintiff.

John V. Campbell and Chas. W. Scott, for City of Cincinnati.

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RESTRICTIONS IN DEED AS TO CHARACTER OF IMPROVEMENTS.

[Common Pleas Court of Hamilton County.]

STEPHEN H. BURTON ET AL V. MABEL A. STAPELY.*

Decided, May 3, 1904.

Deed—Use of Property Restricted to Residence Purposes—Valid, though not in Deeds of Neighboring Lot Owners—Apartment House a Violation of Restriction—Uniformity of Frontage, what Constitutes—Injunction Against Threatened Violation of Restrictions.

1. Where there are restrictions in a deed conveying the fee which forbid the grantee from erecting any building except of a certain kind upon the ground, the grantor may bring an action for a violation of the covenants by the grantee even although the lot is in a subdivision where there is no "plan" (as to kind and cost of houses, etc.), and although there are no restrictions upon any of the other lot owners in the subdivision, and, further, that the grantor owned no lot in the subdivision except this one sold to the defendant.
2. Building an apartment house is a violation of a restriction which requires the grantee to use the lot "for residence purposes only."
3. A restriction in a deed that the front of said dwelling house or any part thereof shall not be nearer to the street than the house next east, means that the front walls of both houses must be in line with each other; and to build a house so that its front wall is in a line with the front of the porch of the adjacent house is a violation of the restriction in the deed.
4. When there are restrictions put upon the grantee in a deed as to the use of the ground, a court of equity will, in behalf of the grantor, restrain any violation of the restrictions which are threatened by the grantee.

LITTLEFORD, J.

The plaintiffs in this case ask for an injunction against the defendant to restrain her from building an apartment house

*Affirmed by the Supreme Court, March 27, 1906 (74 Ohio State), when the contrary judgment of the circuit court was "reversed and judgment given for plaintiff in error on the facts found by the circuit court." For the facts as found by the circuit court, see end of this opinion.

on the lot which they have recently sold to her, on the ground that she is violating a restriction on the use of the property, contained in the deed to her. The facts in the case are not in dispute. Plaintiffs were the owners of a lot of ground situated on the south side of Clinton Springs avenue, in Cincinnati, directly opposite the point where Mitchell avenue runs diagonally into Clinton Springs avenue.

This lot is Lot 1 of A. O. Tyler's subdivision in Cincinnati, Ohio. It was the only lot owned by these plaintiffs in that subdivision, on the south side of Clinton Springs avenue, but they have an interest in tracts of land on Mitchell avenue, not far from the lot in question. There is no "plan" governing the lots in that part of Tyler's subdivision—that is, the owners of the lots in that subdivision can build to the street line if they see fit.

In August, 1903, the plaintiffs in this case sold the lot in question to the defendant, and in the deed to her inserted the following clause:

"Subject, however, to the conditions and restrictions hereinafter contained which are to run with the land herein conveyed and to be observed and performed by, and to be binding upon said grantee, her heirs, representatives and assigns, with the right in the grantors herein, their successors and assigns, or any present or future owner or owners of any lot or lots in said subdivision, their heirs, representatives or assigns, to enforce any or all of said conditions or restrictions; together with all the privileges and appurtenances to the same belonging, and all the rents, issues and profits thereof; to have and to hold the same to the only proper use of the said Mabel A. Stapley, her heirs and assigns forever, subject to the following restrictions and conditions, to-wit: That said grantee, her heirs or assigns, shall use said premises hereby conveyed, for residence purposes only, including necessary outbuildings thereon, and a stable. That no dwelling house shall be erected or re-erected or maintained on said premises to cost less than four thousand dollars, and that the front of said dwelling house or any part thereof, or any structure thereon, shall not be nearer than the house next east of said property from the front line of said premises; and said premises or any dwelling house which may be erected thereon, shall not be used for any mercantile, manufacturing or business purposes; or for a public or private hos-

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pital, or for infirmary purposes; and no fermented, distilled or other liquors shall be sold on said premises hereby conveyed. All building materials of all kinds used in building upon or the improving of said lot, shall be deposited on the lot herein conveyed. The walk and curb shall be protected from any and all damages. All the restrictions and conditions herein are binding upon the said Mabel A. Stapely, her heirs and assigns, until the year A. D. 1917; and this conveyance is accepted by said grantee for Mabel A. Stapely and for her heirs and assigns subject to the foregoing restrictions."

The petition in the case alleges that the defendant, disregarding the covenants in her deed, threatens to build, and is now building a large flat building on said lot; and, furthermore, that she is about to locate her said flat building so that its front wall will be nearer to the front of her lot than the front wall of the dwelling house next east of her property is to the front of its lot. Said dwelling house is alleged to be 65 feet distant from the front line of the lot on which it stands. The testimony of the defendant's own witnesses is to the effect that she is about to erect on her lot a very large apartment house, intended to accommodate from fifteen to twenty families, and to cost \$100,000. The building is to be three stories high, in length 170 feet 6 inches, and in depth 53 feet 3 inches. Furthermore, it is to have no front porches, and the edge of the building itself is to be 55 feet from the front of the lot, while the stone steps in front of it will be 51 feet from the front of the lot. It is admitted that the building will be considerably closer to the street than the front wall of the dwelling house next east, but the testimony shows that the front wall of the apartment house will be on a line with the front porch of the said dwelling house next east.

The questions presented in the case are four in number.

Have the plaintiffs a right of action against the defendants under the circumstances, even conceding that she is about to violate the restrictions of the deed?

Will she violate the restrictions of the deed by erecting an apartment house?

Will she violate the restrictions in the deed by building as close to the front line of her lot as she admits she is about to build?

Ought a court of equity to enjoin the defendant, even if the three preceding questions be answered in the affirmative?

It seems to the court that these facts present a case quite different from the very common case where a tract of land is sold off in lots to different persons, and covenants exacted from the several purchasers imposing restrictions upon the use of the lots sold in pursuance of a general plan for the mutual advantage of all the owners.

Many cases of the latter sort have been cited by the learned counsel for the defendant, and at least one (*Burton v. Cooper*, 8 N. P., 406) by the learned counsel for the plaintiffs; but the principles enunciated in those decisions do not assist in the determination of this case as the court sees it.

Counsel for plaintiffs have, however, cited numerous other cases in support of the principle which the court has adopted as determining this case.

Cases like many of those cited, of a violation of restrictions in subdivisions which have a "plan"—that is, whose houses must be of a certain value, and be situated a certain distance from the street—have given rise to numerous long and learned opinions on whether or not the restrictions in the deeds are covenants running with the land, or create easements—whether or not such restrictions can be enforced by a vendor against the vendee after the vendor himself has broken the "plan" by making a deed to some one without any restrictive clauses, or by allowing some prior vendee to disregard the "plan"; whether or not prior vendees can enforce an observance of the restrictions on the part of subsequent vendees, and whether or not a court of equity ought to interfere, etc., with many other like difficult questions.

It is the opinion of the court that this case should not be complicated with a discussion of any such propositions, and that all cases dealing with subdivisions with a "plan" ought to be put aside in determining the case in hand. There can be no doubt that where a part only of a tract is sold, either the part sold or the part retained may be made subject to a restriction in favor of the other part, or the two parts may be made mutually servient and dominant; or, where the whole tract is

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sold in lots, a restriction may be imposed on each lot in favor of all the others; but, admitting all these propositions to be true, they can not be applied to a solution of the case before us.

The question here is: Can a man who owns but one lot in a subdivision where there is no "plan," put a restrictive clause in an otherwise absolute deed, and then ask a court of equity to enjoin a violation of the restrictions; or, does it make a case for injunction if, in addition, he has an interest in property that is in the vicinity of the lot sold?

That a deed in fee simple may impose some certain restraints upon a vendee is a very old and well established principle. A deed may contain a condition against the sale of intoxicating liquors (Devlin on Deeds, Section 963). A condition may be imposed in a deed on the power of alienation in certain cases, as that the land shall not be conveyed before a certain date or to a certain person (47 N. H., 396). A clause in a deed, "Provided, however, and this conveyance is upon condition, that no window shall be placed in the north wall of the house aforesaid, or of any house to be erected upon the premises within thirty years from the date hereof," is a valid condition (*Gray v. Blanchard*, 8 Pick., 283). See also *Langley v. Chapin*, 134 Mass., 82; *Hayden v. Stoughton*, 5 Pick., 528. A great number of other cases might be cited to substantiate this proposition, but it is sufficient that it has been determined by our Supreme Court.

In *The Village of Ashland v. Greiner et al*, 58 O. S., 67, where a grant of land was made to be used for religious purposes only, and long afterwards the owners of the land conveyed a strip of it to the village of Ashland for a street, the learned court, in its decision, Burket, J., rendering the opinion, uses the following language:

"When value is paid for an estate, such stipulation (a stipulation that the estate is to be used only for particular purposes) is construed to be a covenant running with the land, in the nature of a trust, for the uses and purposes expressed in the deed of conveyance, and in case of a breach of the trust, a court of equity will, in a proper action, decree the purpose of the trust by confining the uses of the estate to the uses and

purposes expressed in the deed. In such case a restricted use of the estate becomes a part of the consideration, and is consented to by the grantee, and it is no hardship on him and his assigns to be compelled to observe the covenants contained in the deed."

Again, in *Stines v. Dorman*, 25 O. S., 580, where a stipulation in the deed was that the grantee, his heirs and assigns, should not allow the premises conveyed to be used as a hotel for a certain period, White, J., states this same principle in the following words:

"The law does not prohibit a grantor from imposing limitations or restrictions on an estate, nor does it require the grantee to take a greater interest than he purchases. If the effect of the stipulation is not to accomplish an illegal purpose, it is lawful; and where it affects the land or the mode of its enjoyment, its effect is put upon all deriving title under the conveyance in which the restriction is found."

The above decisions are sufficient authority to hold that the plaintiffs had the right to insert the restriction in the deed to the defendant, and are entitled to redress if it is broken by the defendant; but it seems to the court that the plaintiff's case is made even stronger by the fact that they have an interest in valuable tracts in the vicinity of the lots sold to the defendant, although not immediately adjacent to it nor in the same subdivision.

In the case of *Reilly v. Otto*, 108 Michigan, 330, the plaintiffs had sold to the defendants a lot with the express restriction: "There shall not be placed or erected at any time on said premises any store, but only dwelling houses, etc., and that no store or saloon shall be erected or placed on said premises," etc. The defendant opened up a saloon, and the plaintiff sought to enjoin him. The plaintiff had sold other lots in the vicinity without any restrictions, and had leased one piece of property in the vicinity for saloon purposes. Plaintiff himself lived a mile and a half away, and owned no ground immediately adjoining the lot in question, although he did own some in the vicinity. The court held that the plaintiff was entitled to an injunction, because a property owner has the right, when he sells his land,

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to restrain its use by his grantees within such limits as are reasonable, with a due regard to public policy.

Other cases where a grantor, owning land not immediately adjacent to the lot in question, but in its vicinity, was held to have a right to enforce restrictions upon the use to which the one lot was to be put by his grantee, in whose deed proper restrictions had been incorporated, are *Smith v. Barre*, 56 Michigan, 314; *Winnetoesaukee Camp Meeting Association v. Gordon*, 63 N. H., 505; *Warren v. City*, 22 Ia., 351, and *Whitney v. Union Railway*, 77 Mass., 359.

In conclusion upon this branch of the case, the court is of the opinion that the restrictions contained in the deed in this case are valid and binding ones as between grantor and grantee, and that the complainants have a right to maintain an action because of the violation of the covenants by the respondent.

Coming now to the second question in this case, is the erection of an *apartment house* a violation of that clause in the deed to the respondent which requires her to use the premises "for residence purposes only"?

In *Rose v. King*, 49 O. S., 213-227, the Supreme Court of Ohio gave the following definition of a tenement house:

"A building the different rooms or parts of which are let for residence purposes by the possessor to others, as distinct tenants, so that each tenant, as to the room or rooms occupied by himself, would sustain to the common landlord the same relation that a tenant occupying a whole house would do to his landlord."

This definition was adopted in *Park Co. v. Van Duzen*, 63 O. S., 183-200, with the comment that the use of a *dwelling* as either a lodging house or a tenement house is not a use for the purposes of a *private dwelling* or *residence only*.

The words "private dwelling" and "residence" are used as synonyms there, because there is no rule of grammar by which an adjective placed before the first two nouns united by a conjunction modifies both nouns. It modifies the one only before which it is placed.

It seems to the court that these last words from the 63 O. S. ought to settle the question here.

Suppose that a dwelling had been built on this lot and it was about to be used for a tenement house, as defined by our Supreme Court. The language of the 63 O. S., just quoted, is clear that this would not be a use of the dwelling for the purposes of *residence only*.

Now, there is no difference between a tenement house and an apartment building, except that one is for poor people and the other is for well-to-do people. The definition of a tenement house by the Supreme Court applies with exactness to an apartment house.

Hence if the erection of a tenement house on this lot would violate this provision of the deed, so also would an apartment house violate it.

The third question in this case is: Will the defendant violate her covenant if she erects a building so that its front wall will be on a line with the front of the porch of the dwelling house on the lot next east of her premises?

In the case of *Graham v. Hite*, 93 Kentucky, 474, the covenant reads:

"It is further agreed that the building or buildings that shall be erected on said lot shall set the same distance back from Front street as the house now erected on the southwest corner of said Front and Oak streets."

A building was begun with its front wall on a line with the front wall of the house referred to, but it had a porch projecting, and it was held that the front wall of the house must be on a line with the front wall of the next house, and that the front of the porch was not the front of the house.

In *Maguire v. Caskey*, 62 O. S., 419, it is held that building a porch inside the limit is not violating the restrictions in the deed, and, although there is a case in 168 Penn. State, 178, holding the contrary, still this court is of the opinion that the preponderance of the authority, as well as the reason of the thing, is in favor of holding that the defendant ought not to build the front wall of any structure upon her premises nearer to the street than is the front wall of the next house east.

The fourth and last question in this case is whether or not an injunction suit is the proper action to be brought by these plaintiffs.

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No case cited by the defendant's counsel is to the effect that a court of equity will refuse to enjoin the threatened violation of a restriction in a deed. There probably is no authority to that effect. The most that the cases cited by the learned counsel hold is that it is *discretionary* with the chancellor to enjoin or not. Whatever may be the rights, however, of the plaintiff in the various cases, which, as pointed out at the beginning of this question, may arise where there is a subdivision with a "plan," it seems to this court that between the grantor and grantee in a deed there can be no question but that a court of equity ought to enjoin the threatened infraction by the grantee of a covenant in his deed. *Lloyds v. London, etc.*, 2 DeG. J. & S., 568.

The right of the plaintiff to an injunction is in fact determined by our Supreme Court in the case of *Ashland v. Greiner*, 58 O. S., 67-75, *supra*, so that the question is not a new one in this state. The holding in the Ohio cases is to the effect that the original grantor and his heirs have the right to apply in such cases to a court of equity.

The decree of the court is that the defendant is enjoined from erecting any sort of building except a dwelling house upon the lot in question, and from constructing the front wall of the residence which she may erect on said lot any closer to the front line of her lot than is the front wall of the dwelling house on the lot next east of her premises.

The holding of the circuit court, which was reversed, was that the reservation in the deed limiting the use of the property to residence purposes had as its chief purpose the exclusion therefrom of all business of every kind, and inasmuch as the only business which could be connected with an apartment building would be the renting of the apartments, and the testimony did not disclose that the renting would be done on the premises, the erection of such a building would not be in violation of the restriction in the deed as to the use of the land for residence purposes only.

The restriction as to uniformity of frontage the circuit court held would be violated by placing the front of the apart-

ment building on a line with the veranda of the house adjoining; but as the plaintiffs were not the owners of any lot on that side of the avenue, and their lots on the opposite side would not be affected by any violation of the restriction as to the front line of the proposed building, they would not suffer any damage thereby, pecuniary or otherwise.

The finding of facts made by the circuit court were as follows:

1. Many years before this controversy arose, A. O. Tyler made a subdivision of land now within that part of Cincinnati called Avondale. Through this tract west from Reading road now runs Mitchell avenue. In front of the lots of defendant in question and hereinafter described, Mitchell avenue divides. The continuation west is called Clinton Springs avenue, while the branch that turns northwest is called Mitchell avenue. It is in a part of the A. O. Tyler subdivision, not yet again subdivided, on the south side of Clinton Springs avenue, that the lots in question lie; and it is over the covenants, restrictions and conditions in the deed to these lots that the controversy arises. The plaintiffs and their wives are the grantors in said deed and the grantee in the same is the defendant.

2. A large tract of land comprising that part of the A. O. Tyler subdivision lying north and east of Mitchell avenue and also some other land beyond, in the Bleachley farm, was, in 1893, laid out as the Rose Hill Park subdivision by Robert Mitchell, the then owner. By agreement and advertisement all land in this division was to be sold under a uniform form of deed containing certain restrictions called the Rose Hill deed. All land in that subdivision has in fact been so sold with one or two exceptions, and the different lot owners now number about sixty.

The Rose Hill Park subdivision is known and designated among property owners and real estate dealers as a first-class subdivision, available for and occupied by private residences only, and within the past five or six years over thirty private residences have been erected thereon costing from \$6,000 to \$40,000 each; most of the lots have a frontage of about 100 feet and are laid out on winding avenues. There is but one

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single dwelling house on each lot, with the exception of one double private residence which was erected prior to the laying out of the Park subdivision in 1893. And there is no business of any kind carried on in any part of the Rose Hill Park subdivision nor of the larger A. O. Tyler subdivision.

3. Plaintiffs still own a large undivided interest in the unsold portions of the Rose Hill Park subdivision, such interest amounting in severalty to about twenty lots. Plaintiffs still own an undivided one-fifth interest in a large tract of about seventy acres on both sides of Mitchell avenue and north of Clinton Springs avenue, most of which was a part of the A. O. Tyler subdivision. To the south of Mitchell avenue before the conveyance next mentioned, plaintiffs and other of the Mitchell heirs owned all the land fronting on said two avenues, same being likewise part of the A. O. Tyler subdivision. This land came to these holders respectively from Robert Mitchell, or his trustees, without any restrictive covenants or conditions.

4. Prior to the sixth day of August, 1903, plaintiffs, in addition to their lands north of Mitchell and Clinton Springs avenues, owned the two lots next mentioned on the south side of Clinton Springs avenue, being the only lots on the south side of said avenue so owned by them.

That on or about said date said plaintiffs and their wives, *i. e.*, Stephen H. Burton and Ellen Webb Burton, his wife, and Robert M. Burton and Mary Tyler Burton, his wife, in consideration of the sum of forty-five hundred and fifty (\$4,550) dollars to them paid by Mabel A. Stapely, sold and conveyed to said Mabel A. Stapely, the defendant herein, the following two lots, described as follows:

That certain lots of land situated in Mill Creek township (now city of Cincinnati), Hamilton county, Ohio, being 65 feet wide on the south side of Clinton Springs avenue, commencing at a point on the said south line 260 feet east of James McKeehan's east line; thence eastwardly on said south line 65 feet to a point; thence southwardly between said two points and between parallel lines and lines also parallel to said McKeehan's east line the full depth of lot No. 1 of A. O. Tyler's Avondale Park, Plat Book No. 2, page 194. Being a part of the property

conveyed to the grantors herein by Albert H. Mitchell et al, by deed dated February 9, 1900, recorded in Deed Book 837, page 625, Hamilton county, Ohio, records.

Also, all that certain lot of land in Section 9, Town 3, Fractional Range 2, Miami Purchase, city of Cincinnati, Hamilton county, Ohio, beginning at a point on the south side of Clinton Springs avenue 647.12 feet west of Reading road, said point being 65.06 feet west of a stone, set for the northwest corner of a tract in said section owned by Lillie I. Ellis; thence with the south line of said Clinton Springs avenue, north 59 degrees 28 minutes west 65 feet; thence south 30 degrees 47 minutes west 190.78 feet more or less; thence south 58 degrees 39 minutes east 65 feet; thence north 30 degrees 47 minutes east 191.70 feet more or less to the place of beginning, being the same property conveyed to the grantors by deed from Albert H. Mitchell and wife, dated December 13, 1901, recorded in Deed Book 868, page 297, Hamilton county records of deeds.

Which said two lots are contiguous to each other.

Said grantors, the plaintiffs, in the deed conveying the above mentioned premises, granted and conveyed to defendant all their estate in the same, but they stipulated as follows: Subject, however, to the conditions and restrictions hereinafter contained which are to run with the land herein conveyed and to be observed and performed by, and to be binding upon the said grantee, her heirs, representatives and assigns, with the right in the grantors herein, their successors and assigns, or their present or future owner or owners of any lot or lots in said subdivisions, their heirs, representatives or assigns to enforce any or all of said conditions or restrictions. To have and to hold the same to the only proper use of the said Mabel A. Stapely, and her heirs and assigns forever, subject to the following restrictions and conditions, to-wit: That said grantee, her heirs and assigns, shall use said premises hereby conveyed for residence purposes only, including necessary outbuildings thereon, and a stable; that no dwelling house shall be erected or re-erected or maintained on said premises to cost less than \$4,000, and that the front of said dwelling house or any part thereof or any structure thereon, shall not be any nearer than

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the house next east of said property from the front line of said premises, and said premises or any dwelling house which may be erected thereon shall not be used for any mercantile, manufacturing or business purposes, or for a public or private hospital or for infirmary purposes, and no fermented, distilled or other liquors shall be sold on said premises hereby conveyed.

All materials of all kinds used in building upon or improvement of said lot shall be deposited on the lot herein conveyed.

This deed was duly executed and acknowledged by the said grantors and on or about the fourteenth day of August, 1903, was duly recorded in Deed Book 891, page 488. And said grantee took possession of said property pursuant to said conveyance. The deed was made out on a Rose Hill form of deed and the foregoing are the same covenants, conditions and restrictions as are in such form, except as to shrubbery on the sidewalk. Defendant herein also bought a lot next adjoining the lots just mentioned on the west from Richard H. Mitchell, by deed dated December 30; 1903, recorded in Deed Book 898, page 594, records of deeds of Hamilton county, Ohio; this deed contains the following clause:

The grantee and her assigns covenant with the said Richard H. Mitchell, his heirs and assigns, that they will not place any improvements on said lot nearer the line of Clinton Springs avenue than are the buildings now erected on Clinton Springs avenue to the east of said lot.

5. On or about the eleventh day of March, 1904, defendant, by her contractors, started to build a \$100,000 apartment house or flat building on the aforesaid three lots, occupying nearly the whole frontage of said lots, the same to stand with its whole front wall not on a line with the front wall of the house next east but with the front of the porch of the house next east. And from this advanced portion of the flat building four steps or more are to descend forward or nearer the street; so far all the houses, six or seven in number, on the south side of Mitchell avenue, have the front wall at a uniform distance from the street and on a line with the wall of the house next east of defendant's lots.

6. The proposed flat building is to contain about one hundred rooms arranged in sixteen five-room suites and four bachelor suites; each suite has its own kitchen, bath room and hall. The building is to be high-class in architecture and finish. The structure will be three full stories high, with a large attic. It will contain its own heating, power and lighting plant. The middle third of the front of the building will be back some twenty-six feet from the front line of the two wings. Its construction upon a line with the building adjoining on the east would not depreciate the value of the adjacent or surrounding property. The major part of the excavation for the cellar of the proposed flat building has been done. The total number of hours of all employes put in on this work before April 8, 1904, amounted to thirteen hundred and eighty (1380), and the total number of hours of all employes put in on this work after April 8, 1904, was two thousand and ninety-one (2091) hours. The work ceased on the day of the decision awarding the injunction.

7. On Monday, April 15, 1904, the petition was drafted and defendant notified that a restraining order would be applied for the next day, but at defendant's request the application was postponed until April 7, when the petition was filed and the hearing had. On April 29, the decision below in the common pleas court was announced awarding the injunction and the final decree was entered on the third day of May. On the fifth day of May the cause was again argued in the circuit court and on the twenty-eighth of May that court announced its opinion.

John S. Conner, Louis J. Dolle and Constant Southworth,
for plaintiffs.

Shay & Cogan, for defendant.

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State v. Haugh.

AS TO INSPECTION OF MINUTES OF GRAND JURY.

[Common Pleas Court of Montgomery County.]

STATE OF OHIO V. OLIVER C. HAUGH.

Decided, February 14, 1906.

Criminal Law—Defendant Without Right to Inspect Minutes of Grand Jury—Or Stenographer's Notes of Testimony before Grand Jury, Except—Discretion and Inherent Power of Trial Judge—Statutory Provisions.

The court of common pleas is without power in this state to entertain a motion by the defendant in a criminal prosecution to inspect the minutes of the grand jury or a transcript made by the official stenographer of the testimony taken before the grand jury; nor is there any discretion in the court to permit a disclosure of the proceedings before the grand jury except in the actual trial of the case, where the testimony of a witness is a matter of issue in determining the facts which are to be weighed by the jury.

BROWN, J. (orally.)

This matter comes before the court upon a motion filed by the defendant, which is as follows:

"Now comes the defendant, Oliver C. Haugh, by his counsel, and moves the court to grant him leave to withdraw his former plea of not guilty heretofore entered herein, and asks leave of the court to file a motion for an inspection of the minutes of the grand jury and the testimony taken before said grand jury in said case by the state of Ohio against Oliver C. Haugh."

Upon the filing of this motion *pro forma*, an order of court and an entry thereon was allowed by which the former plea of not guilty was withdrawn and leave given to file the motion. This matter was argued by counsel. There was filed one affidavit with the original motion, in which counsel for the defendant, Haugh, stated that the defendant can not make the necessary preparations for a complete and adequate defense unless furnished with an inspection and a copy of the minutes of the testimony heard and taken down before the grand jury for the January term, 1906, upon which the indictments against said Oliver C. Haugh were founded and returned.

Counsel for the defendant, in his argument upon the motion, stated certain facts which he said would be admitted on the part of the state, and the prosecuting attorney, in his argument, stated certain facts which he said the defendant's counsel would admit. There was no dispute as to the facts as stated by counsel in their respective arguments and these can, therefore, by the court be taken as true. The facts, therefore, are virtually agreed upon in the case, and there being no dispute of fact, the entire question then becomes one of law.

It is contended upon the part of counsel for the defendant, Oliver C. Haugh, that they were in such a position by reason of there being no preliminary examination upon the question of the last three counts in the indictments, that they could not go to trial, for the reason that the defendant would not talk with counsel about the case; that when they approached the witnesses, they would decline to be interviewed, and that they were placed by reason of the conduct of the defendant and by reason of the action of the witnesses in the case so that they could not prepare their defense for the trial, and, therefore, in the proper administration of justice that it was left to the sole discretion of the court, and that the court exercising its discretion, under all the circumstances, ought to grant, and the defendant was entitled to receive, an order of the court for an inspection of the testimony taken by the grand jury in order that the defendant might make a proper defense.

We may take these facts, as I have said, as admitted by the state, and consider the question as determined by the statutes of Ohio. This question has never been raised in Ohio in any court in so far as we are able to ascertain either by printed reports or by any other means.

The matter was contended for on the part of defendant's counsel by reason of the statute which was recently passed in regard to the admission of the official stenographer at the session of the grand jury (Section 7195, Revised Statutes). That section provides that the official court stenographer of the county shall at the request of the prosecuting attorney take shorthand notes of the testimony and furnish a transcript of the same to the prosecuting attorney and to no other person; but such

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stenographer shall withdraw from the jury room before the jurors begin to express their views or give their votes on any matter before them. The stenographer shall take an oath to be administered by the court after the grand jurors are sworn, imposing an obligation of secrecy upon such stenographer to not disclose any testimony taken down or heard except to the jury, the prosecutor, or unless called upon in a court of justice to make disclosures.

Pursuant to this statute, John Collins, who is the official stenographer under the law, was appointed and took the oath prescribed therein, took all the testimony of the proceedings and witnesses before the grand jury, has made two transcripts of that testimony and delivered the same to the prosecuting attorney for use in his office, as admitted in the argument of counsel.

Now, it is contended that this being a matter of public record, that the court being in control of the grand jury and its proceedings, that the oath whereby the stenographer is not permitted to make public or to make known this transcript unless called on in a court of justice to make disclosures, really puts it within the discretion of this court, which had control of that grand jury, and of which the official stenographer is an officer, that, therefore it is sufficient for this court having such control, to compel the stenographer to make his disclosures in a court of justice. This is substantially the one point raised upon this question. Arguments of counsel in this case were very able and very exhaustive on the subject and very interesting upon both sides, showing that great thought and much time had been given to it, and since the defendant in this case is on trial for his life, the court has given especial attention to this subject and careful investigation, and whatever the result may be, it is fair to state that the court has endeavored to give every possible opportunity to the defendant in this case that is consistent with the law and the duties of the judge sitting in the trial of the case.

It appears that this motion is customary and is often filed in the state of New York, where a similar code to that of ours is enacted, and that the motion is frequently granted as a matter in the discretion of the court. The first case cited by counsel for the defendant is the case of *People v. Naughton*, 38 How.

Pr., 430, a decision rendered by a court of oyer and terminer, that is, a court to hear and determine criminal cases. It is called the court of oyer and terminer in New York state, which is the same as the court of common pleas, sitting as it does in the trial of criminal cases in this state. In the case in question, it was determined by Judge Pratt, in 1870, that it was within the discretion of the court in that state to grant such a motion for an inspection of the minutes and of a copy of the testimony taken before the grand jury and in possession of the district attorney which is the same as our prosecutor. In this case the court reviews the question quite thoroughly and the arguments of counsel are given *in extenso*. On page 435 it says:

“The power of this court to entertain and decide these questions can not be contradicted.

“The court of oyer and terminer is the highest court of criminal jurisdiction, and has power ‘to inquire by the oath of good and lawful men of the same county, of all crimes and misdemeanors committed or triable in such county; and to hear and determine all such crimes and misdemeanors.’

“This motion does not seek to review any prior determination made in the court of oyer and terminer, but to have the court act upon an indictment now pending therein.

“The grand jury is a constituent part of the court of oyer and terminer, and its proceedings are a part of the proceedings of the court of oyer and terminer. The court ‘inquires’ by the grand jury, and ‘tries and determines’ with the petit jury.

“It has been repeatedly held that when the grand jury is in session it is completely under the control of the court, and the court can at any time re-commit an imperfect finding, or may take measures, on the suggestion of a defendant, to determine whether twelve assented to the bill.

“If then, a defendant, while a grand jury is in session, can raise this issue and the court can determine it, why not at any subsequent time prior to trial, as the grand jury (as in this case they did) may have adjourned before the accused knew he was indicted? That the right to raise the question is necessary to the protection of the innocent and is simple justice, needs only to be stated to appear. If the accused upon good cause shown may demand the list of witnesses examined, it follows that the court not only has the power but must make the order.”

Then the judge reviews the question:

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“Suppose the grand jury were not sworn, or that the witnesses were not under oath, or that less than twelve concurred in finding a bill, or suppose the accused comes into court and offers to prove by the foreman that the indictment was never before the grand jury, that what purports to be the signature of the foreman is a forgery, are these not matters to be heard in this court, and is there any other tribunal before which they can be heard in the first instance, and may not the court resort to the minutes of the grand jury for evidence to determine them, or take any other course not in violation of the jurors’ oaths?”

This is all true in this case upon special pleas in this state and those questions are to be determined by authority of the court in this state.

“Abuses have become frequent in the grand jury system, and in many instances great injustice has been perpetrated upon individuals. Many indictments are found that are never brought to trial, many innocent persons are indicted, when if sufficient scrutiny had been observed an indictment would never have been found.

“Many cases are to be found where parties who have been defeated in a prosecution before an examining magistrate, have presented themselves before a grand jury, and upon a one-sided statement procured an indictment.”

It is not pretended that any power can control the grand jury in the performance of its duty, but the power should and does reside in the courts, and of which grand jurors are a constituent part, to inquire whether the grand jury has performed its duty or whether it has exceeded its power.

“Assuming that the court has ample power to decide the questions raised by the motion, the question is, shall the accused, upon these motion papers, have a list of the witnesses examined before the grand jury?”

The court reviews that and grants the motion for a list of the witnesses before the grand jury.

In this case, the list of the witnesses is public property, a matter of public record and can always be obtained at the clerk’s office or from the prosecuting attorney’s office, and there never has been a refusal, or would it be lawful under the law of this

state to keep the defendant from obtaining a list of the witnesses, and the name of the prosecuting witness is always endorsed, under the statute of this state, upon the indictment.

Then Judge Pratt, in *People v. Naughton, supra*, coming to the part of the motion as to the minutes, says, page 443:

“That part asking for copies of all minutes made in grand jury room when said indictment was found is denied, for the reason that the motion papers do not state facts sufficient to warrant such an order. They do not state wherein any of the proceedings of the grand jury were irregular, so the court can judge whether it is a matter competent for the defendant at this time to challenge or investigate, or wherein an inspection is essential to protect any right of the defendant, or wherein the nonproduction of the minutes will work an injustice, or that he can not more properly derive all the information he seeks from other sources. Before the court order the district attorney to produce any paper which he has deemed it his duty to withhold, the party seeking such an order must bring himself strictly within the laws. It may also be said that it does not appear from said motion papers but that all that appears on said minutes may be matters required by law to be kept secret.

“Neither does it appear that said minutes contain one item of matter to the possession of which the defendant is entitled, in order to prepare for trial.

“The court can not permit the said minutes to be used to disclose how any juror voted, or what was said by any juror during their deliberations, or to impeach a regular finding of a grand jury. It is only within certain restrictions that any inspection of the minutes can be allowed. The accused not having brought this branch of his motion within the rule, it is denied.”

That is probably the strongest case upon this point on the statutes of the state of New York.

But let us inspect the penal code, the code of criminal procedure of the state of New York, to determine what the oath and what the proceedings of the grand jury are. Section 245 of the code of criminal procedure provides substantially the same oath that is provided for the foreman of the grand jury in this state. The oath as to secrecy is as follows: “The counsel of the people of this state, your fellows’ and your own you shall keep secret,” and there is no other reference, as it is under the statutes of this state wherein it is provided: “The counsel

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of the state, your own and your fellows' you shall keep secret unless called on in a court of justice to make disclosures."

This section of the penal code of New York to which I have just referred, is followed by some six or eight sections, which provide that the court, in charging the grand jury, shall read and explain. Section 265 reads as follows:

"Every member of the grand jury must keep secret whatever he himself, or any other grand juror may have said, or in what manner he, or any other grand juror, may have voted, on a matter before them."

Section 266: "A member of the grand jury may, however, be required by any court to disclose the testimony of a witness examined before the grand jury for the purpose of ascertaining whether it is consistent with that given by the witness before the court; or to disclose the testimony given before them by any person upon a charge against him for perjury in giving his testimony, or upon his trial therefor."

That is substantially the law in this state. This section of the penal code or of the code of criminal procedure of the state of New York provides that if called upon in a court of justice to make disclosures, under the circumstances as explained in this section, a member of the grand jury may testify as to the testimony given before the grand jury for those purposes, and it has always been so construed, and it has been the practice in this court, when called upon in a court of justice to make disclosures. That is, in the trial of the case where the same questions arise as are provided for in Section 266 of the New York code, jurors may testify as to what took place before the grand jury in regard to the testimony of witnesses.

Now, let us see what further the New York statutes provide in order that we may determine this question.

The sections of the New York statutes which will be found in the general laws of the state of New York, Cumming & Gilbert's Vol. II, page 1548, provide for the appointment of stenographers and typewriters, by the county judge—a large part of the statute is not necessary to be considered in determining this question. I will read from the latter part of paragraph 1 of the law in which it is provided that "Whenever directed by the

district attorney," said stenographer "shall have authority to take and transcribe the testimony given before the grand juries in said counties of Albany and Oneida, and, whenever required by the district attorney to attend upon and take and transcribe the testimony given at coroner's inquests and the examination and trial of criminal cases, which said testimony so taken and transcribed shall be for the exclusive use and benefit of the district attorney of said counties, unless otherwise ordered by the court."

Section 4 of this act, on page 1550, provides "That it shall be lawful for any stenographer or clerk, duly appointed and qualified as hereinbefore provided, to attend and be present at the session of every grand jury impaneled in the county in which he is appointed, and it shall be his duty to take in shorthand, if appointed as a stenographer, and upon a typewriting machine, if appointed as such clerk, the testimony introduced before such grand juries, and to furnish to the district attorney of such county a full copy of all such testimony as such district attorney shall require, but he shall not permit any other person to take a copy of the same, nor of any portion thereof, nor to read the same, or any portion thereof, except upon the written order of the court duly made after hearing the said district attorney. All of the said original minutes shall be kept in custody of said district attorney, and neither the same, nor a copy of the same, or any portion of the same, shall be taken from the office of said district attorney excepting as above provided," that is upon the written order of the court and after hearing the district attorney. There is no such provision in the statutes of this state. The cases cited in support of the motion are all New York cases. The case of *Eighmy v. People*, 79 N. Y., 546, which is the report of the highest court in New York state, page 560—the decision rendered in that case was on a similar motion—

"The refusal of the court to compel the public prosecutor to furnish to the prisoner's counsel the evidence before the grand jury was a matter resting in the discretion of the court, and is not the subject of review upon this writ of error."

In *People v. Molineux*, 27 Misc., 60 (57 N. Y. Supp., 936), this matter was considered upon a motion for an inspection of

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the stenographer's minutes of the testimony of the grand jury, and in a very extended decision rendered by Judge Blanchard, sitting in the court of general sessions of the peace, which is the same as the court of common pleas in this state holding a criminal term, it was decided, upon a motion and hearing, that it was right for the court to order an inspection of the minutes in that celebrated case and directed that a copy be produced and given to the defendant. In New York the defendant is permitted to investigate such facts and determine whether there was evidence sufficient to warrant the finding of an indictment, which is not permitted under the laws of this state under any circumstances.

Judge Blanchard, on page 63, says:

"And the defendant's counsel, in his moving affidavit, makes allegations which, in effect, charge that the indictment in question was found upon evidence that is insufficient in law to sustain it, and insists that the defendant should not be put to the expense, notoriety, and ignominy of a public trial without first being allowed an opportunity to ascertain whether the testimony before the grand jury was sufficient to establish a *prima facie* case against him, in the eyes of the law, upon which he can be legally put to his defense. This contention of the defendant is sustained by abundant authority. If the indictment was found without sufficient legal evidence to sustain it, it is not an indictment in contemplation of law, and can not stand. Code of Criminal Procedure, paragraphs 256, 258."

This is not a provision of the statutes of the state of Ohio. We have no such provision. But on reviewing the case solely from the statutes, resting it within the sound discretion of the court, Judge Blanchard granted the motion and directed that a copy of the testimony taken by the grand jury should be delivered to the defendant, Molineux.

In the case cited, *People v. Bellows*, 1 How. Pr. (N. S.), 149, Judge Brady, in passing upon the same question in regard to a bill of particulars and in regard to the list of witnesses and a transcript of the testimony, held that it was within the discretion of the court as indicated therein.

"A copy of the evidence before the grand jury upon which indictments were found should be furnished the accused when

necessity therefor is shown to enable him to prepare for trial, and the matter is one resting in the discretion of the court."

It certainly is resting within the discretion of the court, as explained by the statutes of New York and solely within the discretion as I have read it to you as cited from the original sections of the statutes of New York which I have here.

It is contended further on the part of counsel for the defendant that the grand jury being a part of this court and being under the control of this court, that, therefore, where the statutes provide in the oath to the stenographer, as it does in the oath to the members of the grand jury, that they shall not make disclosures except when called upon in a court of justice to do so, gives this court the discretion to direct such testimony to be given. If the statutes of the state of Ohio provided that such testimony could be given after a hearing, and whenever the court should determine that the defense was required by reason of a peculiar state of facts, either that there had been no preliminary examination upon the subject, or that it was impossible for certain public reasons to obtain the testimony, then the court might very properly in this case, if it found the facts to be as stated, grant such a motion. But I hold that in this state there is no discretion in the court upon this subject, that the statutes provide that the testimony and the proceedings taken before the grand jury shall be kept secret, that no disclosures shall be made under any circumstances except when called upon in a court of justice to make disclosures, and that that does not mean in the proceedings of this court in general but must be in the actual trial of a case wherein the testimony of a witness is a matter of issue in determining the facts which are to be weighed by the jury in the case that is being heard; that it would be a breach of the law if I should direct that this testimony should be taken from the prosecuting attorney, which was taken by one of its officers, appointed by the state, really a part of the prosecuting attorney's office as an assistant; it saves the prosecuting attorney from taking down and writing out his notes of the testimony, as was formerly done. There was no provision then and there is no provision now whereby we can compel him to disclose what notes he takes. The mere fact of

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this additional aid being given to the prosecutor should not cause the court to make that a public record open to the inspection of every person who was indicted or by his counsel, whether for ulterior motives or not, and if so ordered would warrant the prosecutor who must ask for the stenographer in not requesting the stenographer for the grand jury.

I have carefully considered this matter, and I must overrule the motion.

It is contended that the defendant, Haugh, will not talk to counsel. For what reason? If the defendant is insane and his counsel thinks so, there is a provision of the statute as to that (Section 7240, Revised Statutes). If his client will not assist counsel for defendant, it is not the fault of the prosecuting attorney. There is no provision of the law by which the court can assist. The counsel can take such proceedings as to them may seem proper and just. He may be insane or he may not. If counsel think he is insane, they can take the section of the statute which provides for an examination, with which they are familiar. If not, they will have to take the consequences from the testimony in court. Of course it is an embarrassing position for counsel to be placed in, but for this there is no appeal to the discretion of myself sitting as judge here and administering the law. The defendant has every opportunity in a case of this kind to make a proper defense and will be protected by the court. He stands innocent until proven guilty. Under all the circumstances, I feel that even if I had been authorized to grant it and had the discretion, I am not sure that I would grant the motion. At any rate, I have no power and the motion is, therefore, overruled.

MR. MATTERN: If the court pleases, as I understand, the court overrules the motion solely on the ground that under the law you have no right to even entertain the motion.

THE COURT: Yes, sir; that is the ground.

MR. MATTERN: To that we desire to reserve our exception because that is subject to review. If the court had simply held that it had the power—

THE COURT: If I held that I had the discretion and would not grant it, it could not be reviewed under the decisions of the

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courts, but I go further than that and say that I have no inherent power under the statute to grant the motion and, therefore, the motion is overruled, and it may so appear in the entry.

MR. MATTERN: To that we note our exception.

THE COURT: The plea of not guilty may be restored in the entry as provided by the statute.

R. R. Nevin, Prosecuting Attorney, and *E. G. Denlinger*, for plaintiff.

Conrad J. Mattern and *Harry F. Nolan*, for defendant.

WORDS OF PERPETUITY IN TRUST DEED.

[Common Pleas Court of Hamilton County.]

GEORGE B. VAUGHAN ET AL, TRUSTEES, v. CATHARINE
ZITSCHER ET AL.

Decided, March, 1906.

Deeds—Executed by Trustees—Word “Heirs” not Necessary to Create a Fee, When—A Trustee not a Mere Repository of Title, When—Exceptions to the Rule as to Words of Inheritance and Words of Limitation.

The use of the word “heirs” or other words of perpetuity in a trust deed are not necessary to vest a fee simple title in a trustee, where the face of the deed discloses a purpose to grant power of sale to the trustee; and the omission to name successors is without significance so far as sales by the original trustee are concerned, and should a new trustee be appointed, he can be empowered to carry out the purpose of the trust so far as is found necessary.

S. W. SMITH, JR., J.

The plaintiffs filed their petition to foreclose a purchase money mortgage on lots 9 and 10 on a plat of subdivision of part of lots 1, 2, 3 and 4 of George Vaughan’s estate, the same being situated on Vaughan road, Price Hill, in the city of Cincinnati.

The defendants’ answer sets forth the fact that on the 17th day of September, 1903, plaintiffs herein, as trustees, conveyed by deed of general warranty to Catharine Zitscher said real

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estate, but sets up by way of defense that said deed did not convey to her the fee simple title in said property, and in support of that claim there is set forth in the answer a copy of the deed from John Vaughan to George B. Vaughan and James P. Vaughan, trustees, recorded in Deed Book 839, page 241, of the Records of Deeds of Hamilton County, Ohio; and asserts that said deed in fact did not vest a fee simple title to said premises in said trustees, but said trustees are entitled to only an undivided interest in the same as heirs of John Vaughan, deceased, by reason of the fact of the omission from said trust deed of the word "heirs" or other words of perpetuity, and asks to be relieved from their liability under said mortgage.

Plaintiffs have filed a demurrer to this answer and the question raised thereby is whether or not the word "heirs" or other words of perpetuity in a trust deed are necessary to vest a fee simple title in a trustee.

The deed from John Vaughan to George B. and James P. Vaughan, trustees, conveys lots 1, 2, 3 and 4 of the subdivision of the estate of George Vaughan, deceased, made in proceedings in partition in case No. 3885 of the Common Pleas Court of Hamilton County, Ohio, wherein Liberty Vaughan et al were plaintiffs and John Vaughan et al were defendants, as recorded in Book of Records of Deeds of Hamilton County, Ohio.

The terms of this deed are as follows:

"Whereas the said John is desirous of improving certain real estate now to him belonging and hereinafter described, to the end that the same and the proceeds thereof may be by him better enjoyed during his lifetime; and whereas the said John Vaughan is desirous of making such disposition of his property as will enable the same to be disposed of before or after his decease in such manner and at such times as will preserve the same from possibility of sacrifice, and will insure to himself and his children, as hereinafter named, the most desirable results therefrom; now, therefore, this indenture witnesseth that said John Vaughan, in consideration of the sum of \$1 in lawful money of the United States, and other good and valuable considerations, to him paid by the said George B. Vaughan and James P. Vaughan, receipt whereof is hereby acknowledged, has granted, bargained, sold, released, confirmed and conveyed, and by these

presents does grant, bargain, sell, release, confirm and convey to and unto the said George B. Vaughan and James P. Vaughan, and their successor hereinafter designated, as trustees, to and for the uses and purposes hereinafter set forth, all of the certain lots, pieces or parcels of land now to him belonging and lying, being and situated in Delhi township, Hamilton county, Ohio, and more particularly hereinafter described, as also all other real or personal property now to him belonging wherever situated, with the reversion and reversions, remainder and remainders, rents, issues, profits and proceeds thereof and therefrom arising in any manner whatsoever, and all the right, title, interest, possession, claim and demand whatsoever, as well at law as in equity, of the said John Vaughan in and to the same. [Then follows the description of the property.] The same to be held in trust and to and for the uses and purposes hereinafter named, hereby giving and granting to the said George B. Vaughan and James P. Vaughan, and their successor hereinafter designated, as trustees, full power and authority to rent, lease, sell, mortgage, or in any other manner encumber or dispose of said real estate, or any part or parcel thereof, at public auction or by private contract, upon such terms, at such prices, and at such times and places as said trustees shall deem expedient; and also to execute, deliver and receive such instruments, assurances and conveyances as shall be requisite therefor. I hereby further authorize my said trustees and their successor to grade, street, subdivide and make such improvements in, upon and about such real estate or any portion thereof as they may in their judgment deem to be to the betterment thereof, including the erection of new buildings thereupon preparatory to the sale thereof, thereafter or at such time or times as they may deem to be expedient. I further empower my said trustees at their discretion to purchase at public sale any real estate on which they may hold a mortgage, to protect said trust fund, and hold and dispose of such purchased realty as they may deem to be expedient. I further direct that if either of the two trustees herein named die, resign, or become incapacitated before the completion of the trust, that the survivor shall continue to execute the provisions of this deed alone, and such survivor as successor shall be clothed with all the powers and be subject to all the provisions hereinbefore and hereinafter provided for said two trustees named. I hereby direct that the proceeds resulting from the disposition of the property hereby so conveyed in trust and coming into the hands of my said trustees hereunder shall be applied as follows."

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He further provides in the deed that out of said trust funds he shall be provided during his life with suitable means of support and for the distribution of the residue thereof amongst his children.

Numerous authorities have been cited to the court relative to the question as to whether the trustees took a fee simple title to the property, so as to enable them to sell and convey to purchasers a fee simple title in said real estate. Among the authorities cited on this question, the court will call attention to the following:

Jones on the "Law of Real Property in Conveyancing," Vol. 1, Section 593, p. 488, lays down the rule—

"There is an exception to the rule that the word 'heirs' is necessary to create a fee in case of a trust. When upon the face of the deed it appears that the conveyance is in trust for a use, the full purpose of which requires, or may possibly require, the vesting of a fee in the trustees, he is held to take an estate in fee simple without the use of the word 'heirs' as a word of limitation upon the estate conveyed. Thus, a deed to trustees and their successors in trust to sell and convey in fee simple absolute, without the word 'heirs' in either the habendum or granting clause, conveys to the trustees an estate in fee simple." (Citing numerous authorities in support of the rule.)

Washburn on "Real Property," 6th Ed., Vol. 1, page 75, Sec. 149, says:

"Trustees, however, take a legal estate commensurate with the equitable estate, and that only, without regard to the words of limitation used. The trustee will take whatever legal estate is necessary to enable him to carry out the trust. * * * Thus a grant to A B in trust to sell carries a fee."

Vol. 27 of the Am. & Eng. Enc. of Law, 1 Ed., p. 107, Sec. 14, says:

"In order that the trustee may acquire any estate or interest in the property conveyed, some power must be reposed in him or some duty imposed upon him, that will constitute him more than a mere repository of the title. * * * The estate of the trustee is commensurate with the powers conferred by the trust and the purposes to be achieved by it. Whatever estate is needed to effectuate the settlor's intention in creating the trust, even to a fee simple, the trustee acquires. * * * It matters

little what form of words has been employed to create the trust * * * the doctrine just stated being universal, that is to say, that despite the language of the instrument, whatever estate is necessary for the full execution of the trust, vests in the trustee."

In 12 Mich., 241, *Angel v. Rosenbury*, at p. 266, the court says:

"In a conveyance in trust for the sale of the land and real estate and * * * for the payment of debts from the proceeds, in such a case we do not think the word 'heirs' is necessary to convey a fee * * * the trustee must be held to take an estate as large as may be necessary for the purposes of his trust, whether the conveyance contained words of inheritance, or not."

In 113 Mo. Rep., 188, *Ewing v. Shannahan*, at bot. p. 193 and top 194, the court says:

"The deed in question would pass a fee simple estate to the trustee, for, though in general * * * words of inheritance are necessary to pass a fee, yet there are exceptions to the rule. Thus, when lands are devised or conveyed to a trustee without the use of the word 'heirs,' and it is necessary that the trustee should take an estate of inheritance in order to enable him to carry out the intention of the donor, he will take an estate in fee simple."

The Circuit Court of Hamilton County in the case of *Stephenson et al v. Sedam et al*, 12 C. C., 408, Syl. 2, holds that—

"No synonym will supply the word 'heir' in a deed, and no circumlocution has ever been held to create a fee, *except in case of a conveyance in trust*. The trustee will take the legal estate in fee, though limited to heirs, without the word 'heirs,' if the trust which he had to execute be to the *cestui que* trust and his heirs."

And in the opinion, page 415, the court adopts the language of 1st Washburn on Real Property, Sec. 53—

"That in the case of a conveyance in trust, the trustee will take the legal estate in fee, though limited to him without the word 'heirs,' if the trust which he has to execute be to the *cestui que* trust and his heirs * * * because without such

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a construction the trustee would not be able to execute the trust.
* * * Thus a grant to A in trust, to sell, carries a fee."

The Supreme Court of Ohio in the case of *Brown v. National Bank*, reported in 44 O. S., 269, Syl. 1 and 2, had occasion to construe a mortgage in which the word "heirs" or other words of perpetuity were omitted, and held:

"By a well established general rule the use of the word 'heirs' or other appropriate words of perpetuity in a mortgage or other deed of conveyance of lands, essential to pass a fee simple estate; but this is not an inflexible rule admitting of no exception or qualification. When the language employed in, and the recitals and condition of, a mortgage plainly evidence an intention to pass the entire estate of the mortgagor as security for the mortgage debt, and the express provisions of the instrument can not otherwise be carried into effect, it will be construed to pass such estate, although the word 'heirs' or other formal word of perpetuity are not employed."

Counsel for defendants in this case cited the court to the 10th Ohio Report, page 1, *Miles v. Fisher*, as supporting their contention that a fee is not vested in the trustees under said deed. But upon examination it will be found that the case is not, in the judgment of the court, analogous to the case at bar. And again the case of *Miles v. Fisher* was questioned as an authority by the Supreme Court in 1 O. S., 478, *Williams v. The First Presbyterian Society of Cincinnati*, at the top of page 503, where the court said with reference to that case:

"But it is to be observed, that the question whether they took a fee, does not seem to have been argued, and the case, as to the point now under consideration, is, possibly, of doubtful authority."

In view of the power and authority expressed in the trust deed in question and the law as hereinbefore cited applicable thereto, the court is of the opinion that the use of the word "heirs," or other words of perpetuity, was not necessary in said trust deed to vest in the trustees the fee simple title to the property in question. The face of the deed shows the purposes

and power of sale given to the trustees; and to carry out the uses for which the deed was made the omission of the word "heirs" is not fatal, for such a deed must necessarily convey to the trustees an estate in fee simple to enable said trustees to fully execute the trust. As to the omission to name successors, this also would avail nothing, as such sales made by the present trustees at least would be valid and vest a fee in the purchaser. This question might never arise if all the property should be disposed of by the trustees prior to their death, and, if not, then new trustees might be appointed to carry out the object of the trust if found necessary. The demurrer of the plaintiffs to the answer of the defendants will, therefore, be sustained.

Gideon C. Wilson, for plaintiffs.

Louis J. Dolle, for defendants.

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**CONCURRENCE OF BENEFICIARIES NECESSARY TO RESCISSION
OF LIFE INSURANCE CONTRACT.**

[Superior Court of Cincinnati, General Term.]

THE AETNA LIFE INSURANCE COMPANY V. E. G. PENN.

Decided, December 23, 1905.

Life Insurance—Vested Interest of Beneficiaries—Concurrence of Beneficiaries Necessary—To Rescission of Contract—Or Suit for Recovery of Premiums Paid—Parties—Pleading—Burden of Proof.

1. Where a plaintiff pleads a right alleged to be vested in himself, and the proof discloses a right vested jointly in himself and another who is not a party to the action, the suit fails, and should be dismissed.
2. The concurrence of the beneficiaries is a condition precedent to valid action on the part of the insured in the nature of treating a contract of life insurance as rescinded and basing thereon a suit for recovery of premiums paid; nor can a suit, without the concurrence of the beneficiaries, be based upon the wrongful refusal of the company to receive further premiums or continue the policy in force.

HOSEA, J.; HOFFHEIMER, J., and LITTLEFORD, J., concur.

The petition filed in the case below on December 15, 1886, by E. G. Penn, alleges in substance that: On December 17, 1874, E. G. Penn, the defendant in error, secured a ten year policy upon his life, in the Aetna Life Insurance Company, plaintiff in error, containing a provision for renewal at the end of that time; that all premiums having been paid, a new policy was issued to Penn, pursuant to the condition of the first policy, on December 26, 1884; that premiums were duly paid on the second policy until June 26, 1886, on which day Penn duly tendered the premium then due, which tender the company refused; and the petition concludes with a prayer for \$8,000 damages and "such other and further relief as the court may deem meet."

The answer of the insurance company filed March 12, 1887, admits the issue of the policy in December, 1884, and avers

that said policy was issued for the benefit of Mary A. Penn, wife of said Elijah G. Penn, and her children by him, and that plaintiff has no interest therein. The answer sets up other defenses, in substance, that at the time of said tender the company was by request of said Penn investigating a charge of intemperance alleged against him, that, if true would have invalidated the policy under a condition of the policy to that effect; and that subsequently said Penn was notified that the premium would be received as of the day when due, but said Penn declined to pay the same; that said company thereupon demanded payment of said instalment of premium of said Penn, and of Mary A. Penn, who declined and failed to pay same; and that said policy has thereby become void; and denying any damage.

A reply was filed on January 4, 1904 (seventeen years later), admitting that the policy of 1884 contained the provision as to intemperance as alleged in the answer, but denying all its other allegations.

Upon the hearing, the introduction of the policies showed that they were issued for the benefit of the wife and children. The court and parties seem to have treated the case, and it was tried throughout, as one for rescission with recovery of premiums paid, and a decree was entered accordingly on February 4, 1905, rescinding the contract under both policies, and finding the sum of \$5,225.94 due as the aggregate of the premiums paid, with interest to the first day of the term, January 2, 1905; and judgment was given for this amount with interest from the last mentioned date.

It will be seen from the foregoing statement of the case that the defendant's first defense, namely, that the policies were issued for the benefit of the wife and children and that the plaintiff, Elijah G. Penn, had no interest in the same, was in the nature of a plea in abatement. The code (Section 4993) provides that suit shall be brought in the name of the real party in interest, except as provided in other sections which have no application here. Section 5006 provides that persons who have an interest in the subject-matter of the action and in obtaining the relief demanded, may be joined as plaintiffs; and Section 5007 provides that those who are united in interest must be joined as plaintiffs or defendants.

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The question then is, whether this action can be maintained in the name of Penn without joining the beneficiaries? The court below resolved the question in favor of Penn, plaintiff below. If this view was erroneous the error was vital; and, as its determination lies at the threshold of any further consideration of the issues involved, we have given it careful consideration.

The rule is well established that the interest of beneficiaries in a life policy taken out for their benefit is a vested one, and can not be impaired by any act of the insured. This rule is accepted by text-writers and courts as invariable.

As expressed in *Joyce on Insurance*:

“The weight of authority clearly supports the rule that the beneficiary under an ordinary life policy, has such a vested interest that the assured has no control over the disposal of the fund except with the beneficiary’s consent (Section 730) and can not surrender without such consent.” (Section 853; see also Section 1659.)

In *May on Insurance* it is said:

“Cancellation can be had only by consent of parties, and when the life of one is insured for the benefit of another, the consent of the beneficiary must be obtained.” (Section 67; see also Section 356.)

A substantially similar statement of the law is to be found in *Bacon on Insurance*, Vol. 2, Section 376.

It is undoubtedly true as a principle of general application that the parties to an executory contract have a right to something more than that it shall be performed when the time arrives. They have a right to the maintenance of the contractual relation up to that time as well; and if one of the parties renounces it before that time the other is entitled to elect whether he will accept or not accept the renunciation. *Perkins v. Frazer*, 107 La., 390; *Rochester v. De La Tour*, 2 E. & B., 678; *Frost v. Knight*, L. R., 7 Exch., 111; *Anson on Contracts*, 290; *Stephenson v. Cady*, 117 Mass., 6; *Rugg v. Moore*, 110 Pa., 236; *Page on Contracts*, 1599.

These principles are well established as applicable to insurance contracts.

Insurance Co. v. Tullidge, 39 Ohio St., 240, holds that where the company wrongfully refuses to receive the premium, the beneficiary has an election of remedies:

(1) To tender premiums until the policy matures and then sue upon the contract.

(2) To treat the contract as at an end and sue for rescission and recovery of premiums paid; and,

(3) To obtain a judgment continuing the policy in force.

The reason for requiring a rescission, as stated by May on Insurance, is that the insured can not recover back the premiums paid and leave the question of liability on the policy open (see 356).

One of the principal references cited by Judge Okey for the holding in *Insurance Company v. Tullidge*, *supra*, is the case of *Day v. Insurance Company*, 45 Conn., 480, wherein the same election of remedies is declared; but it is there also held that the concurrence of both parties is necessary to terminate the policy (p. 497), and as the plaintiff sued upon breach of the implied contract by defendant to accept premiums and keep the policy alive, and sought to recover back the premium paid without having elected to consider the policy at an end, thus leaving the question of defendant's liability open, the court ordered an arrest of judgment.

This point was further emphasized in 46 Conn., 483, where it is said:

"Assuming that the defendants had no right to cancel the policy for the non-payment of the premium, the policy remaining a continuing contract in full force until the plaintiffs elected to treat it as rescinded."

If, therefore, the basis of the action to recover back premiums paid is the voluntary act of the insured in electing to treat the contract as rescinded, and if the insured can not surrender without the concurrence of the beneficiaries, such mutual concurrence is a condition precedent.

In *Joyce on Insurance*, under the head of Rescission, it is said:

"In determining the right of one whose life is assured for the benefit of another, the same principle is involved as in the

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case where the question arises as to the right to change a beneficiary; but it may be stated here that, except there be some right reserved in the contract, or unless the act be within some permissive statute, one whose life is insured for the benefit of another can not rescind or surrender the policy without the beneficiary's consent." (Section 1651.)

In line with this doctrine is the holding in *Manhattan Insurance Company v. Smith*, 44 Ohio St., 156, wherein Judge Spear says:

"Had the husband, independent of any relation as agent for the wife, power to surrender the policy. * * * There was value in the policy and, at least to that extent, the wife's right in it was a vested right. She was the beneficiary named in it, and upon both reason and authority we think it clear that no new contract or arrangement of any kind which affects the vested rights of the beneficiary in the policy can be made with the company alone with the insured. * * * In the payment of premiums he was in law her agent. * * * The relation of principal and agent implies trust and confidence. Here was antagonism and a direct effort to sacrifice her rights for his benefit. The company was bound to know that as agent he could not lawfully do that. The husband, having no authority then either by reason of having paid the premiums, or by his position as insured in the policy, nor yet as agent for the wife to make a surrender, it follows that the attempted surrender of the policy was inoperative, and the rights of the beneficiary were not impaired by the attempt."

To the same effect is *Washington Bank v. Hume*, 128 U. S., 195, wherein Chief Justice Fuller says:

"We think it can not be doubted that, in the instance of contracts of insurance with a wife or children, or both, upon their insurable interest in the life of the husband or father, the latter, while they are living can exercise no power of disposition over the same without their consent, *nor has he any interest therein of which he can avail himself.* * * * It is indeed the general rule that a policy and the money to become due under it belong, the moment it is issued, to the persons named in it as beneficiaries; and that there is no power in the person procuring the insurance by any act of his by deed or will, to transfer to any other person the interest of the person named."

In *Trabendt v. Insurance Co.*, 131 Mass., 167, the policy was issued upon request of the husband, who paid the premiums, but the application was made out in the name of the wife by the agent—the parties not understanding English and not knowing what the paper contained. In the suit for premiums a verdict was rendered for defense, which was confirmed by the Supreme Judicial Court, which said:

“The contract of insurance was between defendant and the wife. Premiums were paid by the husband with her consent and on account of her policy. He incurred no responsibility to her by reason of such payments, was no party to her contract with defendant and suffered no injury from the invalidity of that contract. If any action can be maintained to recover the amount of the premiums so paid it must be in her name and not in his.” (Cit. 9, 111 Mass., 542.)

To the same effect see *Whitchhead v. N. Y. L. Ins. Co.*, 102 N. Y., 143, wherein it is held that in a policy upon his life for the benefit of his wife and children, the husband, in whatever he does in perfecting and continuing it, acts as their agent, and they acquire a vested interest in it upon delivery to insured, and that the husband has no authority without the assent of the assured to surrender the policy, such act not being within the scope of his authority. See also, *Stickcn v. Schmidt*, 64 O. St., 354 (359); *Foxhever v. Order of Red Cross*, 2 C. C.—N. S., 394.

It would seem to be a fair deduction from these authorities that the wrongful refusal of the insurer to continue the policy in force can not be availed of in a suit to rescind the policy and recover premiums without the assent and concurrence of the beneficiaries. In the present case there is not only no consent or concurrence shown, but such is negatived by the pendency of a suit by the wife to perpetuate testimony with a view to a suit against the company at the maturity of the policy upon death of the insured. It is manifest that as the basis of recovery of premiums is a judicial rescission of the contract grounded upon the concurring acts and assent of the company and the insured, such rescission would, if effective, destroy whatever right the beneficiaries may have in the policy. It is also manifest that such judgment could not be effective without the ap-

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pearance of the beneficiaries in the suit as parties, and this for the reason expressed in *May on Insurance (supra)*, Section 356, that the insured can not recover premiums paid and leave the question of liability of the company open.

Clearly upon these authorities, the suit in its original form as an action at law for damages merely, could not be maintained, because in this form the pleader had mistaken his remedy. In such case a judgment must fail upon motion to arrest, as in the case of *Day v. Ins. Co.*, 45 Conn., 480, cited in *Ins. Co. v. Tullidge*, 39 Ohio St., 240. For a like reason the suit to rescind and recover premiums must fail because of lack of power in Penn, *solus*, to rescind or accept the forfeiture without the concurrence of the beneficiaries. Stated in another aspect, the plaintiff below failed in sustaining the burden of proof. He has pleaded a right alleged to be vested in himself, and the proof shows a right vested in himself and another jointly, which other is not a party.

It is true that a few cases are to be found that may seem to support a contrary view. Thus in *Insurance Company v. Cogbill*, 30 Gratt., 72, it was held that upon the insolvency of the company the insured who paid the premiums—and he alone—had a right to demand return of the premiums, and that the wife was not a necessary party; but there the failure was not the voluntary act of the company in seeking to abrogate the contract but a failure of consideration through involuntary causes. In *N. Y. Life Ins. Co. v. Bonner*, 11 Neb., 169, a somewhat similar ruling is based on a code provision similar to our Section 4995, authorizing suit by a person in whose name a contract is made for benefit of a third person, but this would seem to be a misfit, because the authority given is obviously one simply to enforce the contract and not to rescind it. A third case, *Abell v. Penn. Ins. Co.*, 18 W. Va., 400, is based on the implied promise by the defendant upon rescinding the contract to return the money paid, *ex equo et bono*, to the insured, the implied promise being regarded as made with the party from whom it was received.

But is apparent that these cases entirely ignore the important considerations upon which the modern and better considered

cases and text statements of the law rest, and must be regarded as superseded thereby.

If the conclusions we have reached are correct it follows that the judgment below must be reversed, and it is so ordered, and proceeding to render the judgment that should have been rendered, judgment will be entered for defendant dismissing the petition with costs.

Judgment below reversed and judgment entered dismissing petition.

James J. Muir and Thomas B. Paxton, for plaintiff in error.

Lewis Hicks and Hicks & North, for defendant in error.

ASSESSABLE POLICIES OF INSURANCE ON THE MUTUAL PLAN FOR STREET RAILROAD COMPANIES.

[Common Pleas Court of Montgomery County.]

THEODORE W. STONE, AS RECEIVER, ETC., v. THE C., D. & T.
TRACTION COMPANY.

Decided, April 16, 1906.

Insurance—Casualty Policies for Protection of a Street Railway Company—Written on the Mutual Plan—Recovery by Receiver of Assessments by Suit—Contract not Ultra Vires—Powers of Corporations—Section 3239—Pleading.

1. A mutual casualty association, incorporated under the laws of a foreign state providing for the incorporation and regulation of insurance companies, for the purpose of carrying on business as an accident insurance company, and insuring its members on the mutual assessment plan against personal injury, disablement or death resulting from traveling or general accidents, or from the pursuit of any trade or business, and against injuries of every nature and description to persons or property, causing loss, damage or liability, is sufficiently empowered to write an assessable policy of insurance on the mutual plan, for a street railroad company in Ohio, absolving it against "injuries of every nature and description to persons or property, causing loss, damage or liability." On such casualty association becoming insolvent, its receiver, duly appointed by court, may maintain an action against said street railroad company to recover an assessment ordered

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by court to be levied on the members of said association, for the purpose of paying losses and expenses and otherwise liquidating the affairs of said mutual casualty association; and the plea that said contract is *ultra vires* on the part of said association, can not be urged on demurrer to a petition for such recovery, as the contract is not on its face beyond the scope of the power of the corporation by which it was made, and a proper showing to support the application of such doctrine must be made by the defendant by way of answer.

2. Corporations in Ohio are expressly authorized to do all needful acts to carry into effect the objects for which they are created, and accordingly they may become members or stockholders of a mutual insurance association or company for the purpose of their own proper protection; and a contract so entered into is not *ultra vires*, but valid, the general rule against incorporated companies purchasing shares in other companies notwithstanding.

SNEDIKER, J.

This action is brought to recover an assessment alleged to be due from the defendant to the plaintiff as receiver, on a certain policy of insurance providing against liability for injury to, or death of, persons arising by reason of casualty occurring in, upon, about or by reason of the street railroad or its equipment.

The petition recites that the defendant, the C., D. & T. Traction Company, is a corporation under the laws of Ohio, and that there is due the plaintiff, as aforesaid, the sum of \$1,528.35 upon the following cause of action, to-wit: On the 31st day of March, 1896, the Electric Mutual Casualty Association of Philadelphia, Pa., of which this plaintiff is receiver, was duly incorporated under an act of the General Assembly of the commonwealth of Pennsylvania, approved the 1st day of May, 1876, together with its various supplements providing for the incorporation and regulation of insurance companies for the purpose of carrying on business as an accident insurance company, and insuring its members on the mutual assessment plan against personal injury, disablement or death, resulting from traveling or general accidents, or from the pursuit of any trade or business, and against injuries of every nature and description to persons or property causing loss, damage or liability; and thereupon duly entered upon the business for which it was incorporated and continued in the exercise of its rights and

franchises, with its home, first, at Scranton, and afterwards at Philadelphia, until the 7th day of May, 1900, when this plaintiff was appointed receiver thereof.

On or about the 22d day of June, 1896, the Dayton Traction Company, an Ohio corporation, made application to said Mutual Casualty Association for an assessable policy of insurance on the mutual plan, and the said Mutual Casualty Association duly issued and delivered to the said Dayton Traction Company, a policy, No. 128, which policy remained uncanceled until the 22d day of June, 1897.

The petition further recites that the policy was issued on a basis of two per cent. of the gross traffic receipts of the defendant, and that in no event the total amount of premium and liability of any member of the association was to exceed five per cent. of the gross traffic receipts of the insured.

The premium due on policy No. 128—which is the policy above referred to—was two per cent. of \$50,945.04, which was the amount of the gross traffic receipts of the defendant during the life of the policy. Of this amount the defendant has paid the sum of \$600, leaving a balance of \$418.90 still due and unpaid.

The petition then goes on to recite the appointment of the receiver, and further says, that on the 20th day of July, 1903, the court ordered that an assessment be levied on the members of the association who have held assessable policies for the purpose of paying losses and expenses.

The petition further recites that under and by virtue of said order of the court, said policy held by the Dayton Traction Company was assessed the sum of \$1,528.35.

The plaintiff further says that the C., D. & T. Traction Company is a corporation under the laws of Ohio, formed by the consolidation of the following corporations, viz.: The Southern Ohio Traction Company, the Cincinnati North-Western Railway Company, the Miamisburg & Germantown Traction Company, and the Hamilton & Lindenwald Electric Company; and that the said Southern Ohio Traction Company was formed by the consolidation of the Cincinnati & Hamilton Electric Street Railway Company, the Cincinnati & Miami Valley Traction

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Company, and the said Dayton Traction Company, and plaintiff claims the amount of the assessment heretofore referred to.

To this petition a general demurrer has been filed. The points urged on behalf of the demurrer are:

First. That the petition shows on its face that the contract of the insurance company was *ultra vires* and void on its part.

Second. That the petition shows that the contract of the traction company in becoming a member of said Mutual Casualty Association is *ultra vires* and void on its part.

As to the first point, the plaintiff is a Pennsylvania corporation, controlled and governed in its operations by the laws of that state, and it does not appear from the petition how far the contract is affected by those laws. The only recourse the court has is to a general interpretation of that clause reciting the purposes of incorporation, above set out in full. We refer particularly to the latter part thereof, which says: "And against injuries of every nature and description to persons or property causing loss, damage or liability."

This seems to us sufficiently general to cover such liability as is here alleged to have been incurred.

Beach, in his "Modern Law of Contracts," at Section 965, says:

"Corporations are the creatures of law, and they can only exercise such powers as are granted by the law of their creation. An express grant, however, is not necessary. In every express grant there is implied a power to do whatever is necessary or reasonably appropriate to the exercise of the authority expressly conferred."

In the 96 U. S. Rep., in the case of *Railway Co. v. McCarthy* (page 267), the court say:

"When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid. Corporations are presumed to contract within their powers. The doctrine of '*ultra vires*,' when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong." (Citing 22 Cal., 620; 29 N. J. Eq., 542; 63 N. Y., 62.)

In 5 Fla., case of *Southern Life Insurance & Trust Company v. Lanier*, the syllabus recites:

"Where a grant of power is clearly defined, and no mode is prescribed for its exercise, it is for the corporation to adopt such mode as, in its judgment, will secure the purposes contemplated."

In Thompson on Corporations, Section 5641, the rule is laid down that—

"It is a general principle of law that every corporation has, by necessary implication, the power to do whatever is necessary to carry into effect the purposes of its creation, unless the doing of the particular thing is prohibited by law or by its charter."

We are not informed by a reading of this petition that the contract sued on is beyond the corporate power of the plaintiff. If it is prohibited to make the contract by the laws of Pennsylvania, or otherwise limited by its charter, those facts may be relied on by the defendant in its answer.

As to the second point (that the petition shows that the contract of the traction company in becoming a member of said Mutual Casualty Association, is *ultra vires* and void), the principal contention is that the defendant, the street railroad or traction company, had no right to enter into a contract of membership in a mutual company such as this defendant is.

The petition alleges the defendant to be an Ohio corporation, and with respect to it as such, the law is always before us. Section 3239 of the Revised Statutes provides that—

"Upon said filing of the articles of incorporation, the persons who subscribed the same, their associates, successors and assigns, by the name and style provided therein, shall thereafter be deemed a body corporate, with succession, and power to sue and be sued; and contract and be contracted with, acquire and convey at pleasure, all such real or personal estate as may be necessary and convenient to carry into effect the objects of the incorporation, to make and use a common seal, the same to alter at pleasure, and to do all needful acts to carry into effect the objects for which it was created."

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The question then is: Is the acquiring of such insurance the purchasing of such share in the Mutual Company a needful act to carry into effect the objects for which the corporation was created?

It doesn't appear on the face of this petition that it was not. Here again, we must apply the general rules of construction. Morawetz, in his work on Corporations, Section 432, says:

"No rule can be stated for determining, in all cases, whether or not a corporation may purchase shares in another company. Shares are, in reality, the interests belonging to the associates or part owners of the corporate concern; but in many instances they have a fixed value, and are dealt with as tangible property. The right to purchase and hold shares, therefore, depend upon the precise character of the shares and the circumstances of the case."

Following Section 432, Morawetz says, in Section 433:

"A corporation can not, in the absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation; nor can it do this indirectly through persons acting as its agents or tools. The right of forming a corporation is conferred by the incorporation laws only upon persons acting individually, and not upon associations; moreover, it would, under ordinary circumstances, be in violation of the charter of an existing company to subscribe for shares in a new company and assume the resulting liabilities."

In commenting on this latter section, the Supreme Court of Ohio, in the 46 O. S., case of *Railway Co. v. Iron Company*, at page 49, says:

"We think it well settled as a result of decisions in this state, as well as elsewhere, that an incorporated company can not, unless authorized by statute, make a valid subscription to the capital stock of another; that such subscription is *ultra vires* and void."

Then follows the Section 433 of Morawetz, as I have already recited it.

On a cursory examination this—being a broad statement of the rule—would seem to determine the whole matter adver-

sely to such holding of shares, were it not for a case found in the 8th Circuit Court Reports, page 591, *Smith v. Newark, Somerset & Straitsville R. R. Co. et al.* In that case Judge Jenner, of Licking County Circuit Court, in rendering the opinion, says:

“It is urged that the charter of the B. & O. Co. does not authorize it to own stock in another corporation; that it can not legally hold this Drexel, Morgan & Co. stock; that whatever it may have done or attempted to do in the purchase of that stock was *ultra vires* and void. In *R. R. Co. v. Iron Co.*, it is held by the Supreme Court (46 O. S., p. 44) that ‘an incorporated company can not, unless authorized by statute, subscribe to the capital stock of another; a subscription so made is *ultra vires* and void.’ Reading this proposition of the syllabus in connection with the quotation of Morawetz, p. 49, cited in support of it, we think it is clear that the Supreme Court only intended to hold that a corporation can not be an *original* subscriber, or one of the incorporators of another corporation.”

And in another case in the 14th Circuit Court Reports, at page 13, *Norwalk Savings Bank v. The Metal Spinning & Stamping Co.*, Judge King of the Huron County Circuit Court says:

“We think this corporation (referring to the Metal Spinning & Stamping Co.), might lawfully become a member of the loan company for the purpose of borrowing money for any use that it had; but if it did not have that power expressly or by law, still, having borrowed the money and received its benefits, and having contracted and agreed to pay it back, and also agreed that it should be a lien upon its property, that contract a court of equity will execute and they will not listen to the plea of the manufacturing corporation after it had used the money—much less that of another general creditor—that the corporation originally had no power to borrow.”

And in the 40 O. S. (p. 274), case of *Larwell v. Hanover Savings Fund Society*, Judge Dickman, in rendering the opinion, says: 1

“In the case of *Bank of Chillicothe v. Town of Chillicothe*, 7 Ohio, 31, it was held that where a town corporation is invested with the powers usually conferred upon such bodies, a contract

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for borrowing money for the use of the town is obligatory, and binds the corporation for re-payment, although no express power to borrow money be given in the law of incorporation. Hitchcock, J., in delivering the opinion of the court, in words of great force and adapted to the case at bar, says: 'The language of the defendants to the plaintiffs is in substance this: "True, you loaned to us this money; you did it at our earnest solicitation; we have used it for our own benefit; but we have no power to borrow, we violated our charter in so doing, and we will take advantage of this, our own wrongful act, to protect ourselves from the payment of that which is your honest due." No rule of decision which will lead to such manifest injustice ought to be adopted without careful examination and much deliberation.' The attempt of a corporation to avoid the payment of its debts, by setting up its usurpation of power or the plea that a contract which it has deliberately made, and of which it has received the full benefits, is void for want of corporate power to make it, does not commend itself to favorable consideration. The tendency of the courts, based upon the strongest principles of justice, is to enforce contracts against corporations, although in entering into them they may have transcended their chartered powers, when they have received the consideration and the benefit of the contract. And it seems to be now the well established rule that where a contract, not illegal, has been executed and fully performed on the part either of the corporation or of the other contracting party, neither will be heard to object that the contract and such performance were not within the legitimate powers of the corporation." (Citing 29 O. S., 330; 4 DeG., M. & G., 19; 5 McG., 131; 63 N. Y., 62; 55 Ill., 413.)

In the 63d N. Y. the court says:

"The plea of *ultra vires* as a general rule will not prevail, whether interposed for or against a corporation, when it will not advance justice, but on the contrary will accomplish a legal wrong."

In the case at bar, the pleading shows that the contract was one for insurance, a necessary and needful property of the defendant in carrying on its business.

Plaintiff further shows that the contract was executed on the part of the casualty company, and that the mutual feature of the company is limited, as far as any recovery against the

shareholder is concerned, to a definite amount of five per cent. of the gross traffic receipts of the assured.

Taking these averments together with the law given, we believe this, together with the first ground of the demurrer, not well taken, and the same are hereby overruled.

In concluding, permit me to quote Section 7619 of Thompson on Corporations, relative to the defense of *ultra vires*:

"A corporation *can not avail itself of the defense* that it had no power to enter into the obligation to enforce which the suit is brought, *unless it pleads that defense*. This principle applies equally where the defendant intends to challenge the power of its officer or agent to execute in its behalf the contract upon which the action is brought, and where it intends to defend on the ground of a total want of power in the corporation to make such a contract. Under the codes of procedure, which proceed upon the principle that the office of pleading is to require each party to disclose to his adversary the real ground of his action or defense, it is not necessary to plead the defense of *ultra vires*, but *facts must be set out* showing that the instruments were issued or the acts done contrary to law."

Let an entry be drawn in accordance with this ruling of the court.

Rowe & Shuey, for plaintiff.

W. C. Shepherd and Shotts & Millikin, for defendant.

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STOCKHOLDERS' LIABILITY OF ESTATES OF DECEDENTS.

[Common Pleas Court of Licking County.]

JOHN A. ROEBLING SONS CO. v. SHAWNEE VALLEY COAL & IRON
CO. ET AL.

Decided, February, 1906.

Stockholders—Claims on Statutory Liability and Unpaid Subscriptions—Against the Estates of Decedents—Presentation of Claim—Statute Begins to Run, When—Personal Liability of Sole Devisee—Bankrupt not Discharged from Stockholders' Liability, When—Presumption that Stock Transferred at Par was Paid for in Full.

1. It is not a condition precedent to the enforcement of stockholders' liability against the estate of a decedent, that the claim be presented to the executor.
2. As to a claim for unpaid stock subscriptions, the statute begins to run and a right of action accrues from the appointment of a receiver or other act of insolvency on the part of the corporation.
3. Under a will providing that all debts of the estate shall first be paid, the stock of an insolvent corporation comes into the hands of the executor as a liability, and not as an asset; but where the executor is also the sole devisee, and the stock is not specifically mentioned in the will, and is not accepted by the devisee, the statutory liability can not be enforced against such devisee personally.
4. A discharge in bankruptcy is not effectual to discharge a claim for stockholders' statutory liability or unpaid stock subscription, where it appears that the claim was not properly scheduled, and no notice of the bankruptcy proceedings was served on the corporation, and there is no showing that the claim was ever liquidated.
5. A stockholder purchasing stock at par is entitled to the presumption that the original subscriber therefor paid for the stock in full, and a claim on account of unpaid subscription will not lie against such purchaser at par.

SEWARD, J. (orally).

John A. Roebling Sons Co. v. Shawnee Valley Coal & Iron Company et al is submitted to the court upon certain issues raised by the answer of the executrix of the estate of Charles W. Snider, the answer of the executors of the estate of John C. Larwill, and the answer of John C. Hamilton, and, I might also say, the issue as between Mrs. Catherine Snider and the plaintiff

in the case. A reply is filed to these various answers, denying certain allegations, and the case was submitted to the court upon the issues raised by the answers and the reply.

This is a suit to collect unpaid subscriptions to the capital stock of the Shawnee Valley Coal & Iron Company and to enforce the statutory liability of the stockholders of said company. The suit was commenced June 18, 1901. The amended petition was filed February 13, 1902.

First, as to the issues raised upon the claim against the Snider estate, and against Mrs. Snider personally: It is said the claim was never presented to Mrs. Snider, executrix of her husband's estate, and that, by reason thereof, the estate is not liable. She was appointed executrix January 4, 1898. She finally settled the estate May 5, 1900. Was it a necessary prerequisite to the suit to present the claim upon which the suit is predicated to this executrix? As to the statutory liability, this would seem to be impossible.

Section 6108 provides that no executor or administrator shall be liable to the suit of a creditor until after the expiration of eighteen months from the date of the bond, and provides for the presentation of the claim. Counsel are familiar with that section of the statute. The object of the presentation of the claim before suit is that the personal representative may have notice of the demand, its amount and nature, and right to accept and pay the same without suit, and the right to make known his intention to contest by a rejection of the claim. The claim for statutory liability is, from its very nature, unliquidated; its extent can not be ascertained except by proceedings in court such as these are. The assets of the corporation are primarily liable for its debts, after which any balance of indebtedness not exceeding the double liability is to be made up from the solvent stockholders. Can it be possible for a creditor to be definite and certain as to the amount of liability of any stockholder to him until after the assets have been applied to the payment of creditors, and the solvent stockholders have been ascertained? If he can not be so definite and certain, how can proof of claim by affidavit be made? Judge Shauck, in 1 C. C.,

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105, holds that it is not necessary to present such a claim; that it is not necessary to make presentation to the administrator or executor. That from the very nature of it, it is impossible to present it.

There seems to be no reason, however, why the claim for unpaid subscription should not have been presented to the administrator or executor of the estate. That is a liquidated claim.

It is claimed that suit was not brought within two years after Mrs. Snider gave bond as executrix, and that therefore the suit can not be maintained against her as executrix. This two years statute was passed April 8, 1898, and was amendatory of Section 6113, which provides a limitation of four years for like actions. The answer of Mrs. Snider alleges that the corporation went into the hands of a receiver May 9, 1898; that it was then insolvent, and then ceased to be a going concern. What effect did the appointment of a receiver have upon the statute of limitations? Did it not have the effect to give a right of action to the creditor, which he could then pursue, and thus to start the statute of limitations to running? In a former opinion upon this subject in this case, I cited the 49 Ohio State, 663. It is the case of *Younglove v. Lime Company*. I will only read the second syllabus of the decision:

“When, however, the property of the corporation has been placed in the hands of an assignee in bankruptcy, or insolvency, or of a receiver appointed on its dissolution to wind up its affairs, or in some such way has been put in process of application to the payment of its debts, the creditors may proceed against the stockholders without first reducing their claims to judgment against the corporation, and the statute will run in favor of the stockholders from such time.”

So that a right of action accrued as against this estate on May 9, 1898, when this institution went into the hands of a receiver—became insolvent. The statute of limitations of two years was passed April 8, 1898, and was then in force, and was the statute governing when this right of action accrued, if it did accrue, when this concern went into the hands of a receiver. Mrs. Snider was appointed executrix January 4, 1898. She settled as such executrix April 3, 1900. No claim was pre-

sented and no suit was brought until June 18, 1901, more than three years from the date of giving bond by the administratrix.

The case of *William F. Bevitt v. Wallace W. Diehl*, which went to the Supreme Court from Springfield, where the reply set up the four years statute of limitations, which was in force, and a demurrer was interposed to that reply, it was overruled; the judgment of the court of common pleas in that regard was sustained by the circuit court; the case went to the Supreme Court and was there affirmed; and so the Supreme Court has held that where the four years statute was in force that it was applicable to such cases. The Supreme Court affirmed that case without report, and so the court has had to rely upon the record and the brief that are furnished.

As to the personal liability of Catherine Snider growing out of the provisions of the will of her husband: The will gives her all his property absolutely, providing that she shall first pay from any *moneys* of the estate all debts and funeral expenses. It is claimed by the plaintiff that she accepted under the will; that this stock became hers, and that she is therefore liable in this action. Mrs. Snider denies that she ever accepted said shares. This stock, at the time of the appointment of Mrs. Snider, was not an asset of the estate. By virtue of the insolvency of the company, the stockholders' liability, and the unpaid subscription, it became a *liability* of the estate, instead of an asset. The stock is not specifically mentioned in the will. It is claimed, however, that her acceptance under the will bound her to pay any liability attaching to the stock whether she accepted the stock or not, or whether she received any benefit from the stock or not. That is, a person who accepts under a will that provides that that person shall pay the debts of the estate, must pay the debts whether he gets enough property out of the estate or not. There is no doubt but what if this stock had been specifically devised, and she accepted the stock, she might be held liable as a stockholder; as where real estate is devised under certain conditions, then the devisee who accepts the devise is bound by the conditions, and must assume any burden attached to the land by the devise. But in this case, the liability remained the liability of the estate, and if the bar of the statute

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had not fallen would still be enforceable against the estate. So I find as to the estate of Charles W. Snider that the bar of the statute has fallen, and the estate is not liable to the creditors of the corporation, and that Catherine Snider never accepted the stock and she is not therefore liable for the burdens attaching to it.

As to the issue between the plaintiff and John C. Hamilton: John C. Hamilton pleads his discharge in bankruptcy. The reply admits that Hamilton made an application praying to be discharged; that he received a certificate of discharge, but denies that he is discharged from this claim. It says that Hamilton did not name the Shawnee Valley Coal & Iron Company as a creditor; nor did he include the amount due said company for unpaid subscription. That he did not cause or seek to cause his liability upon his stock to be liquidated by said bankruptcy court or any other court. It is shown that in the list of his creditors he stated a possible stockholders' liability to the corporation. From what debts would the proceeding release him? The Bankruptcy Law, Section 17, page 25, edition of July 1, 1898, reads as follows:

“*[Debts not affected by a discharge.]* A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.”

It is claimed that no notice was given to the Shawnee Valley Coal & Iron Company, or to the plaintiff in this case, which is now seeking to enforce the statutory liability of stockholders. Section 58, page 41, provides as to notice:

“Creditors shall have at least ten days notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case

by the creditors, unless they waive notice in writing, of all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions or the discharge of bankrupts," etc.

It is claimed that no notice was ever given of the application of John C. Hamilton to the Shawnee Valley Coal & Iron Company, or the creditors, for discharge; and the testimony shows in this case that this company, while it was not a going concern, held meetings of the stockholders, or directors; that Mr. Ward was secretary, after these proceedings were commenced, or at the time; and he takes the stand and testifies that he never got any communication, and Mr. Smith says that none ever came to him, and that he never got any communication or notice. So that I find that no notice was served upon the Shawnee Valley Coal & Iron Company; that it received no notice; and I find also that the indebtedness was not properly scheduled, if scheduled at all.

What effect do the proceedings have upon debts not properly scheduled? It will not effect a discharge, unless the creditor had actual notice. The Law and Proceedings in Bankruptcy, Loveland, Section 292, page 624:

"A discharge will not release a bankrupt from debts which have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy. Where the court has jurisdiction and the claims have been placed upon the schedule, or if omitted from it and the creditors have had notice or actual knowledge of the proceedings, the debt, if provable, is released by the discharge.

"The rule established by the present act is quite different in many respects from that under the act of 1867. Under that act, if the notice required by the statute had been duly published, the discharge was held to bar the debt, although the name of the creditor was not placed on the schedule nor notice given to him. That is not the case under the present bankruptcy law. Unliquidated claims can not be proved; they must first be liquidated. Loveland, page 245, Section 128.

"A claim to be proved in bankruptcy must be liquidated. The present bankruptcy act provides for liquidating unliquidated claims in the following words: 'Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.'

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“Unliquidated claims which may be liquidated and proved under this provision are numerous and varied. Familiar examples are damages for breach of executory contracts, damage for breach of covenants in a contract and stockholder’s liability.” And other claims that it is not necessary to mention.

The law provides that a person can go into the court, and insist that the claim be liquidated by the court, and has a right to have such proceedings had in regard to that claim as will liquidate it, and ascertain the amount due upon it as against the bankrupt.

Section 63, page 44, Subdivision *b* of the Bankrupt Law provides:

“Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.”

Therefore, they can not be proved before liquidation, as a matter of course. That would necessarily follow.

The 40 Bul., 220-226, is cited to the court by both sides in the argument of this case, and it is claimed to bear out both contentions. It is a case in the U. S. District Court, N. D., E. D., before Harold Remington, Referee, *In the matter of Benjamin L. Rouse, bankrupt.*

“(1). A stockholder’s statutory liability in an insolvent Ohio corporation is not only a liability created by statute, but is also a claim founded upon an implied contract, and, as such, is a provable debt against the estate of the bankrupt stockholder, whenever the circumstances are such that a stockholder’s liability suit would lie.

“(2). It is an unliquidated claim, and, upon application to the court, the court will direct the manner of its liquidation.

“(3). But the court will not proceed to direct the manner of liquidation unless application is made to it therefor.

“(4). In cases of stockholder’s double liability, the court may direct that a stockholder’s liability suit be instituted by the creditor making the application, or that an already pending suit in the state court be maintained for the purpose of liquidating the claim; or, if the facts are simple and undisputed, may itself undertake to determine the amount provable as the bankrupts stockholder’s liability, and to whom the same is payable.”

The court say on page 226:

"Now it seems to me that the real question is not whether the stockholder's liability is a provable debt or not, but is rather whether or not it is an unliquidated debt, and, if an unliquidated debt, how the court shall direct it to be liquidated.

"I can easily see that in many cases the bankruptcy court will direct the claimant, after he has filed his proof of debt, to proceed to liquidate the claim in a stockholder's liability suit before admitting the same to proof or allowing it. But I can also understand how in some cases, where the facts are all admitted, and are all simple and not complicated, the court will itself make the computation."

Then he says:

"It might be so simple a question that the referee could, upon the submission of proper evidence, himself liquidate the respective claims of corporate creditors, but the claimants who here appear, neither present any testimony as to the probable debts of the corporation, solvency of the stockholders, nor any other data except such as appear in their deposition for proof of debt, nor do they make application to the court in accordance with Section 63b [that is the section that I just read] for the court to direct the manner of liquidation. In fact, they refuse to do or attempt to do these things. This being so, they stand in the position of claimants who, having debts which are no doubt provable, are yet unwilling to comply with the statutory requirements for proof of them, and for this reason and not because their claims are in their nature unprovable, the court and referee will not allow them to participate in the election of trustee, and will postpone the admission of their claims to proof and allowance."

So that this court holds in this case that while the debt may be provable, it must be proven. The testimony does not show that the double liability or unpaid subscription was properly scheduled. It does not show notice to the corporation; it does not show that the claim was ever liquidated; and, therefore, the discharge of Hamilton was not effectual to discharge this claim.

As to the John C. Larwill estate, unpaid subscription and double liability:

As to unpaid subscription on the Larwill stock:

It is claimed that Larwill paid full face value without knowledge that the stock was issued for less than par. Cook on Corporations, Section 50, 4th Ed., says:

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“A *bona fide* purchaser for value and without notice of stock issued by a corporation as paid up can not be held liable on such stock in any way, either to the corporation, corporate creditors, or other persons, even though the stock was not actually paid up as represented. Such a person has a right to rely on the representations of the corporation that the stock is paid up. Difficulty sometimes arises in determining what will constitute a sufficient representation that the stock is paid up. A representation by the corporate agents that the full par value will not be required is insufficient. The word “non-assessable” stamped or printed or written on the face of the certificate, is not a sufficient representation that the stock is paid up, so as to protect a *bona fide* purchaser thereof, where the certificate also shows that only twenty per cent. has been paid thereon. Where, however, a statement is made on the face of the certificate that it is paid up stock, the *bona fide* purchaser of the certificate need not inquire further, but may rely on that representation, and is protected thereby against liability.”

In a note it is said:

“Here the appellant is a *bona fide* holder of shares upon which, no doubt, there was a false statement made by the company, of which he had no knowledge, and as to which he was under no obligation to inquire.”

He could rely upon the certificate of stock; if it did not show that it was not all paid up, he could rely upon it, and the presumption was that it was paid.

“A purchaser or assignee of stock which has not been fully paid does not become liable to the corporate creditors for the unpaid balance, where the stock has been issued as fully paid [as it was in this case, as is shown by the certificate] and he has acquired the same in good faith, and without notice that it has not been fully paid.”

Also, Section 257 of this same book:

“The question whether the purchaser of shares is bound to take notice that the stock he purchases is not fully paid for is a serious and complicated one. The better opinion, and the one most in accord with the usages and demands of trade is that, where one buys stock in open market, in good faith, and without notice that the subscription price thereof has not been paid up, such a purchaser can not be held liable to pay the unpaid balance of subscription.”

That is likewise held in the 74th Fed., 118, and the 154th Ill., 458.

There is nothing upon the face of the certificates to indicate that par has not been paid by the person to whom the stock was originally issued, and the purchaser in good faith of the stock on the market from a holder of the certificate has a right to rely upon the presumption that the stock subscription was paid in full. Larwill's executors claim that he paid full value without knowledge. There is no testimony showing that Larwill had knowledge that only 30 per cent. of the stock was paid, and he is entitled to the presumption that it was paid in full, and can not be held liable for the unpaid subscription. But, this principle has no application to stockholders' liability, and the court holds that he is liable to an assessment on the stock liability.

A. A. Stasel, for plaintiff.

Hunter & Hunter, Kibler & Montgomery, J. B. Jones and Jonathan Rees, for defendants.

DAMAGES FOR INJURY TO AN INFANT.

[Superior Court of Cincinnati, General Term.]

THE CINCINNATI TRACTION CO. v. LOWELL WOOLEY, AN INFANT.

Decided, March, 1906.

Negligence—Injury of Infant—Elements Upon Which to Base Damages—Verdict of Jury Should Stand, When—Matters not Susceptible of Expert Testimony—Charge of Court—Speculative Damages.

1. A matter not susceptible of expert testimony should be determined by the jury from the evidence without the expression of opinion on the part of the witnesses.
2. In an action for damages on account of the wrongful injury of an infant, it is erroneous to instruct the jury as to special damages, when the petition does not allege nor the evidence show special damages; and so as to time lost and diminished earning capacity, when there is not evidence relating thereto, and no evidence of the emancipation of the minor.

HOFFHEIMER, J.; HOSEA, J., and LITTLEFORD, J., concur.

The action below was for damages suffered by defendant in error, an infant aged seven years. The action was brought by

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the father as next friend, and the verdict was for defendant in error, in the sum of \$10,200. In due course, judgment was entered on the verdict, and these proceedings in error are had to reverse the proceedings below. Several grounds are assigned, and it is claimed that the verdict is against the weight of the evidence; that the court erred in the admission of testimony, and that there was error in the charge of the court relating to the measure of damages.

We have carefully read the entire record in this case, and although it was argued with much force that the verdict was against the weight of the evidence, we do not feel that we can interfere with the verdict on that account. While we may differ with the jury and while we may even doubt the correctness of its finding, we must be guided by the rule established in Ohio. In *McGatrick v. Wason*, 4 O. S., 566, 575, Judge Thurman said:

“Should we disturb this finding? If it is clearly wrong, we must do so. If we only doubt its correctness, we must let it alone.”

In *French v. Millard*, 2 O. S., 63, the court said:

“We are not satisfied that the verdict of the jury was right, but this is not enough. A mere difference of opinion between the court and the jury does not warrant the former in setting aside the verdict of the latter. That would be in effect to abolish the institution of juries and substitute the court to try all questions of fact.”

We can not say that the verdict was clearly wrong, and, therefore, can not say that the verdict was against the weight of the evidence.

It is claimed that the court erred in permitting the following questions to be asked and answered:

“Q. If the fender of this car had been dropped before the car reached the boy where he was lying on the ground, you may state whether or not, this boy of the size you then observed, would have passed under the fender?

“A. He could not.”

Plaintiff in error duly objected to the admission of this testimony, and noted his exception, and we think that the court erred in overruling the objection of the plaintiff in error, and

in permitting witness to answer the question. The matter was not one that was susceptible of any expert testimony, and it was one of the questions that the jury had to determine for itself under the evidence. The jury had all of the primary facts upon which to form an intelligent opinion, and arrive at a correct conclusion without the use of extrinsic opinions. The fact to be determined was not obscure, and the jury was as capable of determining the question and forming an opinion as an expert. *Railroad Co. v. Shultz*, 43 O. S., 270, 283; *Insurance Co. v. Eshelman*, 30 O. S., 647, 656; *Circleville v. Sohn*, 20 C. C., 368, 373.

We likewise think that inasmuch as the action was brought by the next friend on behalf of the infant, the court erred in that part of its general charge, relating to the measure of damages. The court said in its charge:

"If the jury under these instructions, considering all the testimony as I have here directed, should find for the plaintiff, it would be your duty to assess damages. And in that event, your verdict should be in such an amount as will compensate for the injuries which the plaintiff has actually sustained, directly resulting from the negligence and want of care on the part of the defendant. This would include the pain and suffering that he has endured; time lost by reason of his injury; the loss that may accrue to him by reason of his diminished capacity to earn money, in the event that you find that his injuries are such as to diminish his capacity to earn money. You would be justified also in taking into consideration in your verdict all the expense to which he has been put in consequence of the injury; and if you find for the plaintiff, the jury would be justified in awarding him such damages as may fairly compensate him for the injury."

The petition did not set forth any expense by way of special damages, nor was there any evidence on this point. The charge that the jury would be justified in considering expense, was erroneous, because it permitted the jury to speculate upon the question of damages. *Andrews v. Railroad*, 19 O. C. C., 699; *Railroad v. Zepperlin*, 10 C. C., 36.

That part of the charge quoted, which permitted damages for "time lost by reason of the injury" was also misleading, and also permitted the jury to indulge in speculation. There

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was no evidence of time lost by the minor (Voorheis on Measure of Damages, Personal Injuries, par. 36), and even if there was, the earnings of the minor, as no emancipation was shown, properly belonged to the parent.

That part of the charge that permitted the jury to award damages "for the loss that may accrue to him by reason of his diminished capacity to earn money in the future" was likewise prejudicial to plaintiff in error. If any cause of action accrued for diminished earning capacity during minority, it was in the parent and not in the infant. *Rosencrantz v. Lindell Railway Co.*, 108 Mo., 9.

Although there was no testimony as to expense or time lost, it could not be said the jury under the charge did not indulge in speculation on these various items, concerning which the court had so fully charged, and it could not be said that it did not consider the diminished earning capacity of the infant; or that it did not include in its calculations the ten years, more or less, that remained up to the time of this child's majority. If anything was allowed by way of damages for these various elements included in the charge, it would be impossible to discover it or separate it from the verdict. The question of damages, it can be readily seen, was an exceedingly important element in the case, and as the instructions in regard thereto were misleading and erroneous, and upon a point material to it (*Lowe v. Lehman*, 15 O. S., 179), we are of opinion that the error was prejudicial to plaintiff in error, and we conclude that the judgment must be reversed, verdict set aside and a new trial granted, and it is so ordered.

LITTLEFORD, J.

I concur in this opinion and think the judgment below ought to be reversed for the additional reason that the verdict is against the weight of the evidence.

Kittredge & Wilby, for plaintiff in error.

Byron M. Clendenning, for defendant in error.

SPECIFIC PERFORMANCE AGAINST ONE HAVING NO TITLE.

[Common Pleas Court of Lorain County.]

CHARLES S. FERGUSON v. DAVID KELLEY AND FRANK STANG.

Decided, December 29, 1905.

Specific Performance—Defendant without Title—Conveyance can not be Compelled, When—Nor can Damages be Assessed, When.

1. Where A purchases land of B which B has purchased from C, but which C has not transferred to B, specific performance can not be enforced by A against C, nor can A compel B to compel C to carry out his contract.
2. Moreover, where suit is brought for specific performance against a defendant who has no title, and his want of title was known to the plaintiff at the time of the bringing of the suit, the petition can not be retained for assessment of damages.

WASHBURN, J.

This is an action in which it is sought to obtain specific performance of a contract for the sale of land, and is submitted to the court upon separate demurrers to the petition, filed by said defendants, David Kelley and Frank Stang.

The petition alleged that the plaintiff purchased certain real estate, by contract in writing, of defendant, David Kelley, and—

“That the title to said property on said date (the day of sale) was in defendant, Frank Stang, and that said defendant Frank Stang, prior to the said 29th day of May, 1905, had entered into an agreement with said David Kelley for the sale of said land to said defendant, David Kelley, and that in pursuance of said agreement, said defendant, David Kelley, came into possession of said property, and is still in possession of the same, and has been enjoying the profits and rents of the same, and held himself out to the plaintiff as the owner of said premises. For the want of knowledge plaintiff is unable to state the nature of said contract of sale between said defendants, Frank Stang and David Kelley.”

The petition then states facts which constitute a good cause of action for specific performance against said David Kelley, if the title to said property was in said David Kelley. Nothing further is stated in the petition in reference to the defendant Frank Stang. And the prayer of the petition is, “that each of

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the defendants herein be required to set up his interest in said premises, and that the court order and decree that said premises be conveyed to plaintiff by good and sufficient deed, and such other relief as may be equitable and the court can give."

Does the petition state a cause of action against the defendant, Frank Stang?

It will be noticed that the plaintiff is not claiming as assignee of the contract which is alleged to have been made between David Kelley and Frank Stang. The plaintiff says he does not know what the contract is, and he does not claim to have purchased it. It will be noticed also, that the plaintiff does not claim that said Frank Stang is a mere trustee, holding the legal title for Mr. Kelley.

The plaintiff in order to obtain the relief sought, asks, not only for specific performance of the contract which the plaintiff made with David Kelley, but also for specific performance of a contract which plaintiff claims David Kelley made with Frank Stang, and to which latter contract the plaintiff was not a party, and is not concerned as assignee from either Stang or said Kelley.

An opinion of the Supreme Court of Minnesota is authority for the statement, that the plaintiff is not entitled, under the petition, to the relief which he asks against Frank Stang. In that case the identical question here raised, was decided. That case is found in the 33 Northwestern Reporter, at page 777. That was an action to enforce specific performance of a contract for sale of real estate, and it appeared that B had contracted to sell the land to A, and A in turn had contracted to sell the land to C, and A neglected or refused to complete his contract with B, so as to acquire title, and C brought an action against A and B to compel a specific performance of the contract by A, to the end that B's title might be acquired to transfer to C.

A demurrer was filed and sustained, the Supreme Court affirmed the action of the lower court, saying that, "The plaintiff is not a party to or assignee of the first contract, which is still executory on both sides, and neither of the parties thereto can be compelled, at the instance of this plaintiff, to enter into a litigation to compel the specific performance of that contract as between themselves."

Believing that to be good law, the demurrer of defendant Stang will be sustained, and exception noted.

Does the petition state a cause of action against defendant, David Kelley?

The petition as against Kelley alleges that the plaintiff entered into a contract with Kelley for the purchase of certain real estate, the title of which was not then and is not now in said Kelley.

In Pomeroy's Equity Jurisprudence, 3d Edition, 4th Vol., Section 1405, it is said:

"The contract must be such that its specific enforcement would not be nugatory. Although the contract by its terms can be specifically enforced, the defendant must also have the capacity and ability to perform it by obeying the decree of the court. * * * Finally, the contract must be such that the court is able to make an efficient decree for its specific performance, and is able to enforce its own decree when made."

And the cases cited in support of this proposition, establish the fact that if the defendant is totally unable to perform because he has no title at all, the remedy of specific performance will not be granted.

In the Am. & Eng. Ency. of Law, Second Edition, Vol. 26, at page 39, it is said—

"It may be stated, as a general rule, that a court of equity will not decree the specific enforcement of a contract, beyond the ability of the defendant to perform."

And on page 40—

"Equity will not decree the conveyance of property to which the defendant has no title."

And in 128 United States Reports, at page 667, the Supreme Court of the United States decided that—

"Specific performance can not be decreed of an agreement to convey property which has no existence, or to which the defendant has no title, and if the want of title was known to the plaintiff at the time of beginning the suit, the bill will not be retained for assessment of damages." •

Under these authorities the demurrer of defendant, Kelley, will be sustained.

G. A. Resck, for plaintiff.

Q. A. Gillmore, for defendants.

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In re U. F. Bickley.

WHAT CONSTITUTES UNPROFESSIONAL CONDUCT.

[Common Pleas Court of Butler County.]

IN THE MATTER OF U. F. BICKLEY, EX PARTE.

Decided, March, 1906.

Attorney—Charges of Unprofessional Conduct against—Penal in Nature and Should be Strictly Construed—Must Involve Moral Turpitude within the Lines of Professional Duty—Charging and Collecting an Exorbitant Fee not Ground for Suspension from Practice, When—But False Representations as to an Order of Court Sufficient Ground for Suspension—Pleading—Disbarment Proceedings.

1. The statutes make no provision for any demurrer to be filed to a charge of disbarment; nevertheless, the right is indirectly recognized in the 9th Ohio, where the Supreme Court passed upon a demurrer to charges of that kind.
2. The statute, regulating the suspension and removal of attorneys from their office, is penal in its nature, and should be strictly construed.
3. An attorney, by virtue of his admission to the bar, acquires a right of office to appear in all courts of record of the state, and to constitute a sufficient charge for misconduct in office, the conduct charged must relate to some act of such attorney in his office, and affect his conduct with the court, or the public administration of justice.
4. A specification, under a charge of unprofessional conduct involving moral turpitude, which sets forth conduct which does not involve a professional act, but the conduct of an attorney, as a private citizen, is insufficient in law and does not state a cause, under the statute, for removal or suspension from office, and a demurrer thereto will be sustained, although the act charged amounts to a crime involving moral turpitude.
5. A specification, under a charge of unprofessional conduct involving moral turpitude, which sets forth that an attorney made, presented and collected an exorbitant attorney fee from himself, as administrator, for the purpose of cheating and defrauding the estate, and does not set out that such charge and payment of fees was ever presented to the court for allowance, or entered upon the account of his administration, does not state in law a good cause for suspension or removal from office, and a demurrer thereto will be sustained.

6. A specification which charges that an attorney, who is an administrator, falsely represented to creditors of the estate that he had been ordered by the probate court appointing him to pay but three per cent. interest on a note, when in fact no such order had ever been made, as he well knew, is unprofessional conduct involving moral turpitude, for which he will be held to answer.

KYLE, J.

This case is submitted to the court upon the demurrer of the respondent to both of the charges, and to each specification in support thereof on two grounds.

First. That there are not facts sufficient set forth to require him to answer in these proceedings.

Second. That he should not under the law be required to answer in these proceedings.

The statute makes no provision for any demurrer to be filed to a charge for disbarment; nevertheless, the right to file a demurrer is directly recognized in *The State v. Hands*, 9th Ohio, where the Supreme Court passed upon a demurrer to charges against an attorney.

A demurrer to the charges was also sustained in the case of *The State v. Bentley*, 4th Ohio Decisions, page 362.

The demurrer in effect admits, for the purposes of this hearing, all the allegations contained in the charges and specifications thereunder.

In determining this case as presented and submitted, I will consider the charges preferred in the order they are made a ground for removal from office under the statute.

Under the charge of misconduct in office, two specifications are set forth, and the question presented here for consideration on the demurrer: Is the respondent required under the law to answer to the charge of misconduct in office under the specifications alleged and set forth, admitting them to be true as stated?

The first specification on the charge of misconduct in office, alleges—

“That said U. F. Bickley, acting in the capacity of an attorney at law, and while acting as an attorney for U. F. Bickley, administrator of the estate of Charles Gathman, deceased, charged up to and collected from said U. F. Bickley, as adminis-

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trator of Charles F. Gathman, deceased, for legal services, purported to have been rendered by Bickley & Bickley, a partnership engaged in the practice of law, of which the said U. F. Bickley is the senior member, for said U. F. Bickley, administrator, as aforesaid, the sum of \$750, said sum being exorbitant, as was well known by the said U. F. Bickley at the time he made said charge and collected said amount. That no legal services of any consequence were ever rendered by said Bickley & Bickley to said U. F. Bickley, as administrator of said estate, and the services of an attorney were not necessary in any matters connected with the settling of said estate, and all of which was well known to the said U. F. Bickley at the time he made said charges, and collected said money, and said act was done for the purpose of gain, and to cheat and defraud said estate of Charles F. Gathman, and that all of said acts thus done by the said U. F. Bickley were done by him wrongfully, corruptly and unprofessionally, as such attorney at law, in the manner aforesaid, with the knowledge aforesaid, and with the intent and for the purpose aforesaid."

The second specification avers that U. F. Bickley in like manner charged himself as administrator for certain services amounting to \$60, which were in fact not worth more than \$10 and that the same was done for the purpose of cheating and defrauding said estate.

When a person is admitted to the bar, he is required to take an oath of office, and is thereby admitted to practice as an attorney and counselor at law in all the courts of record of this state.

The statute in providing that misconduct in office and unprofessional conduct, involving moral turpitude, as two separate causes of disbarment would imply that there is a distinction to be recognized between the official conduct of an attorney, and his professional conduct.

Any misconduct in office is cause for suspension or removal. Unprofessional conduct is a cause only when such conduct involves moral turpitude; and the misconduct of an attorney, which pertains to the court, or affects the public administration of justice, should he violate his duties in that behalf, would be misconduct in office, and cause for striking his name from the roll.

And in order to constitute a sufficient charge of misconduct in office, the act charged must relate to an official act, that is, it must relate to his conduct with the court or to the public administration of justice.

The specifications aver that the respondent as attorney, charged, presented and collected from himself, as administrator, fees for which no substantial services had been rendered, with the purpose and intent to cheat and defraud the estate of which he was the administrator.

There is no allegation that Bickley, as attorney or administrator, ever presented any claim for such fees to the court for allowance.

The allegations in the concluding part of specification one, under the charge of professional conduct, can not be considered a part of the second specification under the charge of misconduct in office. Each charge must stand or fall on the specifications thereunder set forth. And there is nothing to show, as a matter of fact, that it is the same item referred to.

The act charged is, what Bickley attempted to do, or did, if such thing can be done, which is not here determined, in dealing for himself with himself in two different capacities or relations.

In the administration of estates, if the administrator renders any services, not required of an executor or administrator, in the common course of his duties, such further allowance shall be made by the court appointing him as the court shall consider just and reasonable for such extraordinary services.

The allowance for attorney's fees or extra compensation is peculiarly within the jurisdiction of the probate court. The fact that U. F. Bickley, administrator, was a member of the firm of Bickley & Bickley, would probably require him to present any claim for their services as attorneys as a claim for extraordinary services. For ought that appears, from these specifications, the charge of fees so averred to have been presented and paid by the respondent, as administrator, to himself as attorney, or the firm of Bickley & Bickley, was never presented to the probate court for its consideration.

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The statute regulating the suspension or disbarment of an attorney at law from practice is penal in its nature, and should be strictly construed.

Under such rule of construction, the court would not be warranted in finding that a claim so charged, presented and allowed by the respondent to himself, was ever presented to the probate court for allowance. Such finding would be going beyond the record, and in the absence of any averment to the contrary, the court would be warranted in finding they were not so presented.

There is no averment in either of the specifications, which sets forth any act on the part of the respondent with the court or the public administration of justice, therefore, it does not effect him in his conduct in his office.

Prior to 1880, the statute providing for causes of disbarment provided that, "An attorney may be disbarred for misconduct in office, or for any good cause shown." Under the law, as it then stood, the court could consider misconduct of an attorney in his professional, business or private life, as a ground for disbarment.

In the codification of 1880, the grounds were changed and a limitation was placed upon the right of the court to disbar and provided that the court might suspend or remove an attorney at law from his office—

First. For misconduct in office.

Second. Conviction of crime, involving moral turpitude.

Third. Unprofessional conduct, involving moral turpitude.

It has been suggested that the court has inherent power, at the common law, to remove and suspend an attorney from his office independent of the statute.

The Legislature has seen fit to set forth and prescribe grounds for removal or suspension; whether or not such regulation limits or controls the course to be pursued, which has been so held in some states, is not necessary here to be considered and determined, as the method sought to be pursued against the respondent in this case is that laid down and directed by the statute.

It is the opinion of the court that the specifications set forth as the basis for the charge of misconduct in office do not relate

to, or charge the respondent with any act or conduct in his office, as attorney, affecting his relations or dealings with the court, or the public administration of justice and, therefore, if such specifications do not so charge the respondent with misconduct in office, they would not be sufficient to require him to answer in these proceedings, and the respondent ought not, under the law, be required to answer, and the demurrer thereto should be sustained.

2. The second charge against the respondent, which is the third under the statute, is, that the respondent is guilty of unprofessional conduct, involving moral turpitude. Under this charge there are eleven specifications, all of which specifications, except the eighth and ninth, refer to the conduct of the respondent in respect to his administration of the estates of Gathman and Sentre.

Counsel for the respondent claim that whatever he did, except as to the eighth and ninth specifications, which are the same as the two specifications set forth under the charge of misconduct in office, that he acted as a private citizen, and that such charges as alleged, do not involve the professional conduct of the respondent.

If the acts charged do not involve the respondent professionally, or in his professional capacity, can they be made the basis or grounds for removal from office, unless a conviction was first had?

The statute as ground for removal, provides:

First. "Misconduct in office," which includes the acts of an attorney with the court, or has relation to the public administration of justice.

Second. "Conviction of crime involving moral turpitude," which presupposes that he has been legally indicted and tried before a jury and found guilty, or confessed in open court, as provided by law.

Third. "Unprofessional conduct involving moral turpitude," which relates to, and includes all his professional acts other than what is included in misconduct in office.

It has been held in New York state by the Court of Appeals (*Rochester Bar Association v. Dorothy*, 152 N. Y., page 596) that—

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Syllabus: "The Appellate Division of the Supreme Court has power to disbar an attorney for professional misconduct without regard to the fact of possible or pending indictment.

"If the charge involves a felony or a misdemeanor entirely distinct from the parties professional action, the court will stay its hand until the criminal trial has taken place; but if the charge involves professional misdemeanor, the fact that some of the acts complained of are felonies, and indictment may follow, is no reason for staying the proceedings to disbar."

The court in the opinion in this case, in discussing the opinion of the Supreme Court of the United States, and the dissenting opinion of Judge Field, in *Ex parte Wall* (107 U. S., 265) say:

"The learned dissenting judge was evidently of the opinion that the act complained of did not concern the defendant in his professional relations to court or client, while his associates entertained the contrary view. The majority opinion distinctly recognizes the rule that where an attorney commits an indictable offense in a transaction not involving his character as an attorney, and does not admit the charge, the court will not strike his name from the roll, until he has been regularly indicted and convicted."

This holding of the New York court is in the face of the fact that the statutory grounds for disbarment is much broader than the statute in Ohio and is as follows:

"An attorney and counselor, who is guilty of any deceit, malpractice, crime or misdemeanor * * * may be suspended from practice or removed from office."

In the case of *Ex parte Steinman* (95 Pa., page 220, syllabus):

"1. An attorney may only be disbarred for misconduct in his professional capacity, or respecting his professional character.

"2. Although there may be cases of misconduct not strictly professional, which would clearly show the person to be unfit to be an attorney, as theft, forgery or perjury, but even for such an offense, he would not be summarily disbarred, without a formal indictment, trial and conviction."

There are a certain class of cases cited, in which an attorney, according to some authorities, may be held to answer, although they do not relate to professional misconduct. But so far as those cases were examined, the offense charged related to some

professional act, or the statute was broad enough to give that right.

Of the adjudicated cases in this state, in one which was determined upon a demurrer to the charges, the case of *Re Dellenbaugh* (17 C. C., 109), the court say:

"The authorities are greatly at variance as to whether the party can be convicted or can be removed for unprofessional conduct involving moral turpitude, where that moral turpitude is a crime, without being first convicted of that crime. The prevailing authorities seem to be that if that moral turpitude pertains to some act done while acting as attorney, the attorney may be proceeded against without being first convicted before a jury, but if it is something lying outside of the attorney's profession or duties as an attorney, there is much more authority going to show that he should be first convicted."

The examination of the authorities cited by counsel outside of Ohio, so far as I have been able to examine them, are cases which rest upon the statutes different from ours, and are not helpful in the construction of the statutory ground for disbarment in this state.

It is not necessary here to determine the extent or nature of the specifications, which do not involve the respondent in his professional capacity, as to whether or not a crime is, in fact, charged. If the conduct charged did not involve the respondent in his professional character but pertained to his acts as a private citizen, and the acts charged do not amount to a crime, a demurrer would be sustained in any event; and if the acts charged amounted to a crime, then it becomes necessary to determine whether or not, under our statute, the charge of a crime is cause for suspension or removal.

While it is true that in some jurisdictions it has been held that this is not an inflexible rule, our statute having provided specific grounds for removal, and if they are strictly construed, I do not see how it can be held that any act done by an attorney, as a private citizen, amounting to a crime, involving moral turpitude, can be made the ground of a charge for disbarment, unless a conviction was first had. And without reviewing the many authorities cited by counsel, suffice it to say that it is my opinion that the authorities justify holding that any act done

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by an attorney, as a private citizen, amounting to a crime, involving moral turpitude, can not be made the ground of a charge for disbarment, unless conviction is first had.

In the states where the charge of a crime has been held to be sufficient cause for removal from office of an attorney, and they have statutory grounds for disbarment, such grounds so stated, as a rule, are broad enough to sustain the charge of a crime as a ground for removal without conviction; but under our statute, the commission of a crime is not made the ground but "*conviction* of crime involving moral turpitude." The statute seems to imply that conviction is a prerequisite to make the commission of a crime the cause for removal.

It is not the crime that is made the cause for disbarment, but the conviction; and to hold that the charge of a crime, if a crime be in fact charged, is a ground or cause for removal, would be going beyond the strict construction of the statute, and render the second cause therein stated meaningless.

It is true that if the act charged involved the professional conduct or misconduct of the respondent, although the act charged amounted to a crime, the respondent could be held to answer, if such specifications were set forth as a cause under the third ground for removal, notwithstanding a conviction was not first had. And to require an attorney to so answer would not affect or impair his constitutional right to be tried by a jury.

Now these specifications are averred under the charge of unprofessional conduct, the third cause, and if the acts charged were not professional acts, but related to the conduct of the respondent as a private citizen, they would not sustain such charge if true.

The charge is unprofessional conduct; then if the act charged did not relate to professional conduct, it would be insufficient whatever the character of the act charged.

That leaves the only question for consideration, the determination of the character of the acts charged. Do they involve the professional conduct of the respondent or simply relate to his acts as a private citizen?

The second, third, fourth, fifth, sixth, tenth and eleventh relate to the conduct of Bickley as an administrator. When

an administrator is appointed, the statute requires the performance of certain duties. The character of the act is not changed by reason of the administrator being an attorney.

It is my opinion that the second, third, fourth, fifth, sixth, tenth and eleventh specifications do not relate to or involve the professional conduct of the respondent. And holding these views, it is the judgment of the court that the demurrer of the respondent to the second, third, fourth, fifth, sixth, tenth and eleventh under the charge of unprofessional conduct should be sustained.

The eighth and ninth are the same as the two specifications heretofore referred to under the charge of misconduct in office.

In arriving at a determination upon the demurrer to such specifications, the court has experienced the greatest difficulty and the conclusions reached are not very satisfactory.

The question presented is: Does a specification under a charge of unprofessional conduct, involving moral turpitude, which sets forth that an attorney made, presented and collected exorbitant attorney's fees from himself as administrator for the purpose of cheating and defrauding the estate, and does not set out that such charge and payment of fees was ever presented to the court for allowance, or entered upon any account of the administrator, state, in law, a good cause for suspension or removal from office?

Where an attorney is an administrator, the law does not contemplate that he will either present to himself or allow himself any attorney's fees; for such services he is to be allowed reasonable compensation as for extraordinary services.

If the statute provides a method whereby an administrator can be paid for any services he renders beyond those ordinarily required of an executor, then any act of the administrator, in attempting to procure attorney fees in any other way, would be of no effect.

It might be said: Suppose that it appeared from these specifications that such claim for fees had been presented to the probate court for allowance, and there was no fraudulent act or misrepresentation to the court of the character and extent of the services rendered, and such court had allowed the entire sum asked for by the respondent, as administrator or attorney, would

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it lie within the power of this court in these proceedings to question that finding regardless of how excessive this court might regard the charge and allowance?

If the door was once open to this line of charges, namely: exorbitant fees as unprofessional conduct involving moral turpitude, what difficulty there would be in placing any limitation upon it.

The employment or payment by an administrator of attorney fees does not bind the estate. *Thomas, Admr., v. Moore* (52 O. S., page 200, syllabus):

"Executors and administrators are personally liable for the services of attorneys employed by them, but their contracts do not bind the estate, although the services are rendered for the benefit of the estate, and are such as the executor or administrator may properly pay for, and receive credit for the expenditure in the settlement of his accounts." Approved and followed in 68 O. S., page 507.

"The rule is that the administrator can be allowed credit only for counsel fees which he has actually paid, and no more than is reasonable compensation for the services rendered to the estate no matter what the administrator has actually paid or contracted to pay; and the burden is on him to prove the necessity and value of these services." *Woerner on Administration*, Section 515, approved, 52 O. S., page 206.

And the question is here presented: Can the concluding averments of the first specification be taken as a part of the ninth since they are both made under the same general charge?

The demurrer is to each of the several specifications, and there would be no more reason for connecting the specifications than the charges. And it is my opinion that each specification must stand or fall by itself. But, as was heretofore stated, it does not appear that the \$60 referred to in the first specification, is the same item as the ninth, and a court would not be warranted in so holding, if it could be considered.

From these authorities, it would appear that it was of no consequence to the estate what U. F. Bickley, as administrator, paid U. F. Bickley, as attorney, or the firm of Bickley & Bickley. In any event, the estate can not be interested or affected by what the respondent did, and it can not be claimed that any advantage, so far as the estate is concerned, could be taken unless the

claim so charged, presented and collected by Bickley for himself or for the firm of Bickley & Bickley was presented to the court for allowance or entered upon his account.

That being true, the respondent would not be guilty of any unprofessional conduct affecting the estate of which he was the administrator.

And the only remaining question to be considered is: Can U. F. Bickley be guilty of unprofessional conduct involving moral turpitude in dealing with himself?

It would be impossible for U. F. Bickley, as attorney, to cheat and defraud himself. U. F. Bickley, as the administrator, possessed all the knowledge and information as to the character and extent of the labor performed as U. F. Bickley, attorney. And if he had voluntarily, as administrator, paid the firm of Bickley & Bickley what right would the court have to say that such act was unprofessional conduct involving moral turpitude?

The anomaly presented is a charge of a man cheating and defrauding himself. Suppose that Bickley personally held a claim, and he himself brought suit for its collection, and he had made an exorbitant charge against himself for the purpose of cheating and defrauding himself, or if he even employed the firm of Bickley & Bickley, and he, as the senior member of such firm, made an exorbitant charge against himself on behalf of the firm, with the intent to cheat and defraud himself, would it be contended that that would be a ground for suspension or removal from office?

It appears to me that the charge on its face refutes itself. If the respondent had done any act or taken any step to make this charge effective beyond himself as against the estate, it would have constituted unprofessional conduct, but in the absence of an averment, the court would not be warranted in finding that the respondent ever presented such claim to the probate court, or entered the same upon his administration account for allowance.

From the face of these charges, the act done did not extend beyond himself, and until an act of this character, namely, the charge and collection of fees is in some way attempted to be made effective against the interests or rights of a third par-

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son, it would not be sufficient charge for suspension or removal from office.

Holding these views, it is the opinion of the court, that a specification under the charge of unprofessional conduct involving moral turpitude, which sets forth that an attorney made, presented and collected an exorbitant attorney's fee from himself as administrator, for the purpose of cheating and defrauding the estate, and does not set out that such charge and payment of fees was ever presented to the court for allowance, or entered upon the account of the administrator, does not state in law a good cause for suspension or removal from office, and a demurrer thereto will be sustained.

Under the first specification, all the acts charged do not affect the respondent professionally, unless the entry of the item of \$60 for making deeds. Even if all was done that is averred in such specification as to such charge, it would not constitute unprofessional conduct.

There is no claim of bad faith or that the amount paid was unreasonable. It is only claimed that the respondent knew it was not a proper charge against the estate, that it should have been paid by the heirs.

All this may be true, yet if it was a just claim, and in the end the same parties would have it to pay, the question of the method or manner of payment would not be of much consequence, so no charge of bad faith or intent to wrong is charged.

Considering specification one, standing alone, it does not state any unprofessional conduct involving moral turpitude that should require the respondent to answer.

Only the eighth and ninth specifications under the charge of unprofessional conduct are charged by the committee, as having been done "unprofessionally." None of the others are so charged. And it would appear that the committee, by the form of their charges, did not think that the professional conduct of the respondent was involved, save in the eighth and ninth. The court in that respect would not be bound by the judgment of the committee.

The last specification, the seventh, in my opinion although not so charged, involves the professional conduct of the respondent. It is charged "that he represented to the said Ollie and

Anna Weir that he had been ordered by E. H. Jones, Judge of the Probate Court of Butler County, Ohio, not to pay but three per cent. interest on said note for the last year, when in truth and in fact no such order had ever been made, all of which was well known to said U. F. Bickley at the time."

Such representations were not a part of the duties of an administrator under the statute, like the preparing and filing an account. And the persons to whom such representations were made were much more likely to be misled by such false statements, because the party representing them was an attorney, and would have the means of knowing.

To make such false representations so admitted by the demurrer would constitute unprofessional conduct involving moral turpitude, and the respondent should be held to answer, and the demurrer thereto should be overruled.

An order may, therefore, be drawn sustaining a demurrer to each and all the charges and specifications thereunder, excepting the seventh, on the ground that the facts set forth are not sufficient to require the respondent to answer, and he ought not under the law be required to answer in these proceedings. As to the seventh specification, the demurrer will be overruled.

J. F. Ncilan, W. C. Shepherd and Brandon Millikin, committee. Andrews, Harlan & Andrews, for U. F. Bickley.

RECOVERY BY MOTHER FOR SUPPORT OF CHILDREN.

[Superior Court of Cincinnati, General Term.]

COLUMBUS L. CLARK V. GEORGIANA CLARK.

Decided, April 24, 1906.

Husband and Wife—Parent and Child—Divorce Granted to Husband in Another State—Does not Release Him from Obligation to Support His Children, When.

The dissensions of parents do not release the father from the obligation to support his children, and the fact that he has obtained a decree of divorce in another state, after a separation which continued for many years, does not bar recovery by the wife from him of money expended in the support of their children prior to the granting of the decree; nor can aggression on her part be inferred

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as a matter affecting the rights of children, where the decree assigns no cause for the divorce and makes no provision for alimony or for the children.

HOSEA, J.; HOFFHEIMER, J., and SWING, J., concur.

The action below was twice tried—the first trial resulting in a disagreement of the jury, and the second in a verdict for plaintiff below, upon which judgment was entered; and the present proceedings are to reverse said judgment for errors alleged.

The facts, in brief, as appear from the record, are these: The parties were married in 1879 and after the birth of three children, to-wit, in 1884, they became separated and thereafter lived apart. The testimony was conflicting as to whose initiative was the cause of separation, but the verdict may be said to imply the husband's fault in this regard; and there is no charge of error as to the action of the jury upon the weight of evidence. Nor do we, upon a careful reading of the record, perceive any error of the court in giving or refusing to give the special charges asked, nor in the general charge; nor in other actions of the court as to which errors are charged.

The principal contest in the argument here arises upon divorce proceedings resulting in a decree of divorce granted by the Kentucky courts upon the petition of the husband. It is claimed that this is for the "aggression" of the wife and that in consequence she can not recover under the Ohio rule, which is claimed in substance to be that the only circumstances under which the mother can recover from the father money expended in rearing a child, is when she is divorced for his aggression and the custody of the child is awarded to her. The cases of *Pretzinger v. Pretzinger*, 54 O. S., 452, and *Fulton v. Fulton*, 52 O. S., 228, are cited in support of this contention. But these authorities apply to relations existing after divorce and not before.

The syllabus of the *Pretzinger* case shows its inapplicability to the case in hand, viz.:

"The obligation of the father to provide reasonably for the support of his minor child until the latter is in a condition to provide for his own support, is not impaired by a decree which divorces the wife *a vinculo* on account of the husband's misconduct, gives her the care and nurture of the child," etc.

In the case at bar the parties separated in 1884; and, whatever the cause, it is clear from the testimony that the husband made no definite effort to provide a home for his family, nor did he offer to relieve the mother of the burden of nurturing and educating the younger children who remained with her. The boy in question (Stewart), who was a baby in 1884, began earning wages in 1899 at the age of fourteen and a half years. In January, 1900, the divorce was granted on the husband's petition under a law of Kentucky making a separation of five years a sufficient cause. The decree assigns no cause and makes no provision for alimony or for the children. Under such circumstances "aggression" can not be inferred as a matter affecting the rights of children. But be that as it may, prior to 1900 there was a period of about fifteen years during which the husband contributed nothing to the support of either his wife or the child. The amount awarded by the jury averages about two dollars and sixty cents a week for the period of the child's life prior to the earning of wages and prior to the divorce of the parents.

The Fulton case presents an application of the same principle adopted in the Pretzinger case. Both cases rest upon the relations of parents to children *after* a divorce, and have no application to relations preceding that event.

The obligations of the husband to support his family while the marriage subsists is inherent in that relation. The dissensions of parents do not release the obligation of the father to his children, although the helpless dependence of a child may require the mother's custody rather than that of the father when parents live apart. If he choose to accept the continuance of such a condition as years go by and makes no effort to assert his more direct responsibility, he may waive the right to the comfort of the society of the child and still be liable for support so long as the necessity therefor exists.

We find no error in the present case and the judgment must be affirmed.

E. M. Ballard, for plaintiff in error.

Bates & Meyer, for defendant in error.

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State v. Cottle, Administrator, et al.

LIABILITY OF SURETIES ON BOND OF AN OFFICIAL.

[Common Pleas Court of Hamilton County.]

THE STATE OF OHIO V. FRANK COTTLE, ADMINISTRATOR OF
GEORGE R. GRIFFITHS ET AL.*

Decided, July 1, 1903.

*Office and Officer—Sureties on Bond of Official—Answerable Only Within
the Letter of Their Contract—And Not for Dereliction Outside of
Official Duty—Sections 4013, 4042, 4047 and 4055.*

A bond for the faithful performance of the official duties of the clerk of a board of education binds the sureties for the faithful performance of official duty only, and not for malfeasance in the performance of duties not imposed by law.

SPIEGEL, J.

The second amended petition in this cause alleges the election of George R. Griffiths as Clerk of the Board of Education of the School District of Cincinnati for three years from April 16, 1900; that he filled said office from that date until his death, October 1, 1900; that he gave a bond in the sum of \$5,000, conditioned upon the faithful performance of all the official duties required of him as clerk of said board, and that he collected under a rule of said board, ordering him to collect tuition fees from non-resident pupils, the sum of \$4,757.23, which he embezzled, for which sum the plaintiff asks judgment against the bondsmen.

In cross-petition one of the bondsmen, William Griffiths, demurs, because said petition does not state facts sufficient to constitute a cause of action against him.

The determination of this demurrer depends upon the question whether it was a proper official duty of the clerk by order of the board to collect said tuition fees and account for them to the board of education, or whether it was the duty of the treasurer of the board of education to collect said fees on the order of the

*Affirmed, *State, for use of, v. Cottle, Adm'r, et al*, 8 C. C.—N. S. 120; affirmed, *State, for use of, v. Griffith et al*, 74 Ohio State, --.

clerk, and account for them to the board; for the rule laid down by Mechem in his work on "Public Officers," Section 282, governs the liability of official bondsmen:

"The contract of sureties upon an official bond is subject only to the strictest interpretation. They undertake in the language of Judge Cooley, for nothing which is not within the letter of their contract. The obligation is *strictissimi juris*; and nothing is to be taken by construction against the obligors. They have consented to be bound to a certain extent only, and their liability must be found within the terms of that consent."

It would be idle to multiply decisions from every state of the Union in favor of this rule of law. Our own Supreme Court has spoken upon this matter. In *McGovney v. The State of Ohio*, 20 Ohio, 93, Judge Ranney, in citing *State v. Medary et al*, 17 Ohio, 565, thus forcibly reiterates the rule:

"The bond speaks for itself, and the law is that it shall so speak, and that the liability of sureties is limited to the exact letter of the bond. Sureties stand upon the words of the bond, and if the words will not make them liable, nothing can. There is no construction, no equity against sureties. If the bond can not have effect according to its exact words, the law does not authorize the court to give it effect in some other way, in order that it may prevail."

In *The City of Greenville v. Anderson*, 58 O. S., 463, where the Supreme Courts holds the bondsmen of the defendant as city clerk liable for his malfeasance, the court finds it to have been one of the official duties of the clerk, imposed upon him by statute, to draw warrants upon the city treasurer for claims allowed by council, and the fraudulent raising of said vouchers and appropriating said accounts, to have been done by him while within the exercise of his official duty. As the court says (page 477):

"It is argued in support of the demurrers that the grounds of complaint made in the petition are the alleged failures of Elliott (the defending city clerk) to properly account for and pay over the moneys he wrongfully obtained from the treasury, which, it is urged, were his individual delinquencies, and not official defaults for which his sureties are answerable, because neither the receipt nor disbursement of the moneys pertained to

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his office. And cases are cited which hold that sureties on official bonds, conditioned that the principal should faithfully account for and pay over all moneys received by him, are not liable for any misappropriation of money which came to his hands otherwise than by virtue of his office. The principle is elementary. The obligation of sureties must be found in the instrument by which they are bound, and can not be enlarged beyond its terms. But there was no failure of Elliott to account for and pay over the moneys he wrongfully received, except his failure to cover them back into the treasury. *His wrong was in the means employed to obtain the money*, and while these were violations of law, they were nevertheless official acts."

The last case upon this subject-matter is found in *State v. Carter*, 67 O. S., p. 423, wherein the Supreme Court holds that a clerk who collects sewer assessments under an ordinance of council, whether valid or invalid, stands legally charged with such frauds within the meaning of the statute defining embezzlement, and if he fraudulently converts the same to his own use, he is guilty of embezzlement; but, adds the court (p. 440):

"We do not have the question of liability of the sureties on the bond of the clerk, for moneys collected under an ordinance passed either before or after the execution of the bond, and in what has been said in this opinion we do not pass on such probable or possible question."

Coming now to examine whether the collection of these tuition fees was a proper exercise of official duty on the part of the clerk of the board of education, the statutes of our state must determine this question, for the board is entirely a creature of statute, and its powers and duties are prescribed thereby. No section of the Revised Statutes of Ohio authorizes the clerk to act as financial officer of a city school district; but, on the contrary, Section 4042, provides distinctly that "in each city district the treasurer of the city funds shall be ex-officio treasurer of the school funds." Section 4013 prescribes that "each board of education may admit other persons upon such terms or upon payment of such tuition, as it may prescribe, and the several boards may make such assignment of the youth of their respective districts to the school established by them as will, in their

opinion, best promote the interests of education in their districts."

It is to be presumed that the board of education passed the rule authorizing the clerk to collect tuition fees and account for them to the board under the statute. But, if so, this action is directly contrary to Section 4047, which provides that "no treasurer of a school district, except in cases otherwise provided for in this title, shall pay out any school money except on an order signed by the president and countersigned by the clerk of the board of education; and no money shall be paid to the treasurer of a district, other than that received from the county treasurer, *except upon the order of the clerk of the board*, who shall report the amount of such miscellaneous receipts to the county auditor each year, immediately preceding such treasurer's settlement with the auditor."

This section does not authorize the clerk to receive any miscellaneous moneys; on the contrary, upon his order they must be paid directly to the treasurer. The clerk is simply made the auditing officer, to keep a check upon the treasurer, and the rule of the board of education, ordering the payment of the tuition fees, or any other moneys to the clerk, is clearly invalid and void. That this is the clear intent of our laws upon this subject is further shown by Section 4055, defining the method of keeping accounts by the treasurer and clerk of a school district, namely:

"The auditor of each county shall furnish to the clerk and treasurer of each school district in his county a suitable blank book, made according to the form prescribed by the commissioner of common schools, in which each shall keep an account of the school funds of his district. The clerk's account shall show the accounts certified by the county auditor to be due the district, *all sums paid to the treasurer from other sources on his order*, and all orders drawn by him on the treasurer and upon what funds and for what purposes drawn. The treasurer's account shall show the amounts received from the county treasurer, *all sums received from other sources on the order of the clerk*, and the amounts paid out, and from what funds and for what purposes paid, and a separate account of each fund shall be kept, and each account shall be balanced at the close of the school year, and the balance in the treasurer's hands belonging to each fund shown."

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It will thus be seen by these sections that there is no authority given to the clerk by statute to receive or disburse any money, but the contrary intent is clearly evinced, especially when examined in connection with the statutes prescribing the duties of the treasurer. The clerk is but the bookkeeper of the board of education, having charge of its records and accounts. No rule of the board of education can change the statutory law of the state, which required tuition fees to be paid directly to the treasurer of the board upon the order of the clerk. The law is well settled upon this point, and among the great number of cases cited to me, I will only quote the syllabus in *The People of the State of New York v. Penwick*, 60 N. Y., 421:

"The sureties upon the bond of a supervisor, containing the usual condition that he will account for all moneys belonging to the town coming into his hands as such supervisor, are only liable for moneys which their principal is authorized and bound by law to receive in his official capacity as disbursing agent for the town; not for that of which he becomes the voluntary custodian, or which is ordered by the board of supervisors, without authority of law, to be paid to him.

"It is the duty of the board of supervisors to receive moneys raised by tax for relief of the poor of towns, and for highway purposes, to be paid over direct to the overseers of the poor and to the commissioners of highways respectively. A supervisor as such has no authority to receive such moneys, even in transit.

"Accordingly held, where a town collector, in compliance with directions contained in this warrant, paid over to the supervisor the moneys collected for the purposes above specified, that the sureties upon the bond of the supervisor were not liable thereon because of his appropriation to his own use of the moneys so received."

Attention is also called to *Board of Education v. Thompson*, 33 O. S., 34, wherein our Supreme Court released the sureties of the treasurer of the board by reason of the illegality of the action of the board.

Following the rule of *stare decisis*, as maintained by our Supreme Court in *State v. Carter*, 67 O. S., p. 440, the demurrer must be sustained.

Harrison & Aston, Frank F. Dinsmore, for demurrer.
Corporation Counsel, contra.

ENFORCEMENT OF STATUTORY LIABILITY OF STOCKHOLDERS.

[Common Pleas Court of Licking County.]

EDWARD UMSTEATTER ET AL V. THE NEWARK SAVINGS BANK COMPANY ET AL.

Decided, February, 1906.

Stockholders—In Insolvent State Bank—Enforcement of Statutory Liability of—Liability Accrues. When—Status as to Estate of Deceased Stockholder—Action by Creditor before Ascertainment of Condition of Corporation.

1. In an action to enforce the statutory liability of stockholders, a demurrer will lie to an allegation in the answer of a defendant that he was not a stockholder at the time the debt mentioned in the petition was contracted.
2. While an action to enforce stockholders' liability ought usually to be postponed until an ascertainment has been made by the receiver of the corporation as to what its assets will be, an action brought by a creditor prior to such ascertainment is not demurrable on that ground.
3. Statutory liability attaches to all who are stockholders at the time of the enforcement of such liability, regardless of the date on which they became stockholders.
4. A demurrer will lie to an allegation by the executor of a deceased stockholder, who alleges that he has fully settled up the estate but does not plead the statute of limitations.
5. Where the insolvent corporation is a bank organized under the laws of Ohio, an allegation that a defendant stockholder is not liable for anything beyond the subscription price of his stock, does not state a good defense.

SEWARD, J., (orally).

The case of Edward Umsteatter et al v. The Newark Savings Bank Co. et al is a suit to enforce the statutory liability of stockholders. The suit originally was a suit to enforce statutory liability, and also to enforce the payment of unpaid subscriptions to the capital stock. The question as to the unpaid subscriptions to the capital stock has been dismissed, and there is, therefore, only one question before the court, and that is as to the statutory liability of stockholders.

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There are several answers and there are demurrers to each one of them. The court will have to take them in their order. They all seem to be different. There is a demurrer to the second defense of the answer of E. L. Weisgarber, administrator. The second defense is as follows:

"The said E. L. Weisgarber says he denies that the said W. G. Taafel was a stockholder in the said Newark Savings Bank at the time the debt mentioned in first and second cause of action was contracted."

This is an important feature in the case, and the Supreme Court has held in the 36th Ohio State, the last case in that volume, that the liability attaches when the contract is made with the creditor of the corporation. This is a decision by a divided court, two of the judges rendering a dissenting opinion. That was under the old statute—Section 3258—which reads as follows:

"The stockholders of a corporation which may be hereafter formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable, in addition to their stock, in an amount equal to the stock by them subscribed, or otherwise acquired, to the creditors of the corporation, to secure the payment of the debts and liabilities of the corporation." That was passed in 1844, I believe (Vol. 52, page 44.) That was the old statute, and remained in force until 1902, when it was amended by the Legislature. It reads—

"Section 3259. The term 'stockholders,' as used in the preceding section, shall apply not only to such persons as appear by the books of the corporation to be such, but to any equitable owner of stock, although the stock appears on the books in the name of another.

"Section 3260. A stockholder or creditor may enforce such liability by action jointly against all the holders or owners of stock, which action shall be for the benefit of all the creditors of the corporation, and against all persons liable as stockholders; and in such action there shall be found and determined the amount payable by each person liable as stockholder on all the indebtedness of the corporation," etc.

This section is in the Revised Statutes of 1880. In this decision by the Supreme Court, wherein the judges differed as to the law governing such questions, the majority of the court

holding that the persons who were stockholders at the time the contract was made with the corporation are the persons who are liable on the stock, two dissenting opinions were rendered, one by McIlvaine and one by Johnson, that that is not the law in Ohio, and holding that those persons who were stockholders at the time the liability is enforced were liable—that they are the persons who are contemplated by the statute. The Legislature, in 1902, amended that statute, and I think in view of that decision of the Supreme Court, although, of course, that does not appear. It is Section 3258:

“The stockholders of a corporation who are the holders of its shares at a time when its debts and liabilities are enforceable against them [that is, against the stockholders, and not against the corporation] shall be deemed and held liable, equally and ratably, and not one for another, in addition to their stock, in an amount equal to the stock by them so held.”

And so the Legislature has fixed the stockholders who are liable to a creditor as those “who are the holders of its shares at a time when the debts and liabilities are enforceable against them,” conforming to the dissenting opinion of McIlvaine and Johnson in the 36th Ohio State. So as to this allegation that Taafel was not a stockholder at the time that the debt mentioned in the first and second causes of action in the petition was contracted, the demurrer to that must be sustained. If it were not for this amendment, as the court views it—the recent amendment to the statute by the Legislature—the demurrer would have to be overruled as to that branch.

Then there is a demurrer to the third defense.

“The said E. L. Weisgarber says that the said W. G. Taafel died on or about the 28th day of July, 1904, long before the commencement of this action. That he, the said E. L. Weisgarber, was on the —— day of August, 1904, duly appointed and qualified as administrator of the estate of said W. G. Taafel and has been acting as such ever since. That the plaintiff has not nor has any one else ever presented to him as such administrator for allowance the said claim set out in the petition, properly verified according to law or any claim whatever.”

This court held in the Roebling Sons Company case (*ante*) that it was not necessary to present a claim against the adminis-

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trator for statutory liability, holding, as the circuit court so held in the 1st C. C. Reports, and the court will not refer to that further.

For fourth defense to the first and second causes of action:

“The said defendant says that in a suit commenced by L. P. Schaus in the Common Pleas Court of Licking County, Ohio, being case No. 13025, long before this suit was commenced, A. A. Stasel was duly appointed by the said court as receiver of the said bank and qualified as such and has been and still is acting as such receiver. That said receiver was ordered by said court to take charge of all of the property, assets, accounts and claims of every description of said bank and convert the same into money. That whatever is due from the said W. G. Taafel, or from said defendant as his administrator is an asset of said bank, and belongs to the said receiver, and it is his duty to collect the same and apply the same as directed by the said court in the said case. That said plaintiff has no right or authority to maintain the said action.”

As far as the second cause of action is concerned, in the petition, this answer would be impervious to a demurrer, but the statutory liability of stockholders is not an asset of the corporation; it is a liability to the creditors, if after the payment of the debts there is not sufficient remaining due to pay the creditors, then they may proceed under the statutory liability of the stockholders. The receiver might bring an action to enforce the statutory liability after it is ascertained that the assets will not pay the corporation creditors. But, he is not the only person. A creditor may do the same thing under the statute; and to say that because a receiver has been appointed, a creditor has no right to proceed, would be flying in the face of the statute, as the court views it; and while this probably ought to be postponed until an ascertainment is made by the receiver as to what the assets of the corporation will be, the court is without authority to control that. And so, the demurrer to these various defenses is sustained.

As to the answer of Judge Hunter as executor of Reinhart Scheidler:

A demurrer is interposed to the third and fourth defenses of this answer.

"3. That neither claim set out in the petition was ever presented to the said executor of said Scheidler for allowance, as required by law."

The court has just passed upon that (*Roebbling Sons Co. v. Shawnee Valley Coal & Iron Co.* [ante]), and sustained the demurrer.

"4. That said defendant was appointed executor May 1, 1903, and filed his first account as such in November, 1904, and was granted an extension of time for one year from the filing of said account, to settle said estate."

The court does not think that allegation makes any defense. And the demurrer is sustained to that.

A demurrer is interposed to the second defense in the answer of Henry Scheidler. The second defense reads as follows:

"That he denies that he was a stockholder, or in any manner connected with the said the Newark Savings Bank Company, prior to January 15, 1904."

Under this section of the statute, if he were a stockholder at the time of the enforcement of the liability, it would make no difference. He would still be liable as a stockholder on the statutory liability. The demurrer to that is sustained.

"4. That he is not indebted in any sum for the stock he held on the 15th day of January, 1904, and that is all he ever held."

I suppose that is intended to be to the second cause of action. But a demurrer is interposed to it, and it will have to be sustained.

A demurrer is interposed to the 2d, 3d and 5th defenses in the answer of Dortha M. Weippert, executrix of Christian Weippert, deceased. The second defense is that no claim was presented to the administratrix within the time required by law, and it is not alleged that she has fully settled up the estate, and does not plead the statute of limitations; and the demurrer to that is sustained. And to the third defense: It alleges the appointment of a receiver, the pendency of that suit; the court has passed upon that, and the demurrer to that will be sustained.

"5th defense. For fifth defense to the said first cause of action, the said defendant says that the Newark Savings Bank

is a corporation organized under the laws of Ohio, and said defendant denies that the holders of the stock in said corporation are liable to anything beyond their subscription thereto."

There is a special statute on the subject of banks, and the court thinks the demurrer to that defense is well taken.

The next is as to the answer of Laura J. Jones, a demurrer is interposed to the fourth defense. "Said defendant says that in a suit now pending in the Common Pleas Court of Licking County, Ohio, being case No. 13025, wherein L. P. Schaus is plaintiff"—that is the same defense that the court has sustained a demurrer to.

The demurrer to all these defenses will be sustained.

INSUFFICIENT GROUNDS FOR RECEIVER OF A CORPORATION.

[Superior Court of Cincinnati, General Term.]

THE AMERICAN FRUIT & STEAMSHIP CO. V. ELSWORTH DOX ET AL.

Decided, January, 1906.

Corporations—Insolvency of—Creditors Holding Claims for Unliquidated Damages—Not Entitled to a Receiver—Status of Cross-Petitioners Who are Mere Contract Creditors—Jurisdiction—Where the Res is in Another State.

1. The mere insolvency of a corporation is not sufficient ground to warrant the appointment of a receiver.
2. A contract creditor of a corporation will not be heard to ask for the appointment of a receiver to collect unpaid stock subscriptions, until he has reduced his claim to judgment and execution has been returned unsatisfied; nor will jurisdiction of the cause be retained for the benefit of such cross-petitioners.
3. A court of equity has no jurisdiction over a foreign corporation where the *res* with reference to which relief is sought is in another jurisdiction and no decree can be made effective.

HOFFHEIMER, J.; HOSEA, J., and LITTLEFORD J., concur.

Error to special term.

Defendant in error was plaintiff below, and plaintiff in error was defendant below. The petition of plaintiff contains two causes of action. One, equitable, to set aside a transfer of real estate, or rescission of a contract to convey real estate; the other, legal claim for money alleged to be due for services.

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The American Fruit & Steamship Company is a foreign corporation, and the real estate referred to is located in the Spanish Honduras. One of the corporation's officers, viz., the managing agent, resided in this county, and the company had an office in Cincinnati and also in Chicago. Cross-petitioners (defendants in error) represent claims for unliquidated damages. They allege that the American Fruit & Steamship Company was insolvent, and asked the court to appoint a receiver, with the avowed purpose of reaching and subjecting to their claims the liability and indebtedness of the several stockholders of the company, for the unpaid balance of their subscriptions to the stock. The court appointed a receiver. It is now claimed that the action of the court was erroneous, and these proceedings are for the purpose of setting said receivership aside.

The bill of exceptions is brief, and it seems that the evidence consisted: (1) Of the motion of the cross-petitioners verified and used as an affidavit. (2) The affidavit of the secretary of the American Fruit & Steamship Company, denying the allegations of the motion. Also, (3) certain statements of the counsel for Dox, plaintiff below, and (4) statements of the counsel for the cross-petitioners. The former represented to the court that his client had practically abandoned his action and he (counsel) was simply a "looker-on"; the former averred his belief that the company was about to withdraw its Cincinnati office and that the company's assets, which consisted principally of the amount due on unpaid subscriptions, would be lost unless a receiver was appointed to preserve them. The appointment of a receiver was vigorously resisted by the attorney for the corporation. The question as to whether the court erred under the circumstances, in appointing a receiver, resolves itself into several propositions:

1. Can a receiver be appointed for a corporation upon the application of simple contract creditors, upon an allegation of insolvency?

2. Have simple contract creditors any right, either directly against the stockholders, to recover the unpaid balance of their subscriptions, or indirectly, to have the unpaid balance recovered through the instrumentality of the receiver of the corporation?

3. Can it be said, as it is here urged, that the court having once acquired equitable jurisdiction, can retain the bill and grant the relief sought by the cross-petitioners?

4. As equitable defenses as well as defenses at law may be waived, can it be said that there was a waiver by the plaintiff in error?

From what has been said, it is apparent that the cross-petitioners come into equity, representing claims for unliquidated damages; they ask to have these damages ascertained, and at the same time, through the equitable remedy of a receiver, practically seek equitable execution. It seems to be settled, that mere insolvency is not sufficient to warrant the appointment of a receiver (*Cin., H. & D. Ry. v. Duckworth*, 2 C. C., 518), and furthermore it is evident that the cross-petitioners, who were simply contract creditors, have not reduced their claims to judgment, nor issued execution, nor has a return "*nulla bona*" been made. Equitable assets of a corporation, such as unpaid stock subscriptions, can not be reached until these various steps have been taken. And nothing short of the taking of these steps places the simple contract creditor in a position to enforce payment of unpaid subscriptions. "The general rule is, of course, that a court of equity will not appoint a receiver of a corporation, upon the application of a creditor without a lien, who has not reduced his claim to judgment." 5 Pomeroy Eq. Jurisp., Section 125 (1905), and cases cited.

In *Bronson v. Schneider*, 49 Ohio St., 438, 440, the court said:

"It is necessary that the creditor's claim be reduced to judgment and execution returned unsatisfied, or, that the property of the corporation, by some legal proceeding, be put in process of application to the payment of its debts, so as to render judgment and process against it impossible or nugatory; as, where the corporation has been dissolved, or thrown into bankruptcy, or placed in the hands of a receiver, or has made an assignment of its property for the benefit of its creditors."

And the court goes on to say:

"Under the Constitution and laws of the state, the corporation property is the primary fund for the payment of the debts of the corporation, and the statutory liability of the stockholders is a security to be resorted to only when the payment of its debts can not be enforced against its property."

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In *North Fairmount Bldg. & Sav. Co. v. Rehn*, 6 N. P., 185, a receiver was asked by simple contract creditors who had not exhausted their remedies at law, and the main object of the suit apparently was to secure the recovery of money alleged to have been illegally paid to the directors, and in that case, Smith, J., in the course of an able opinion held that—

“Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together, gave to these simple contract creditors any lien upon the property of the corporation.” See 2 Pomeroy Eq. Jurisq., Section 1046.

And the court concluded that the court of equity had no power to proceed to apply the corporation assets to the payment of the corporate debts, until the creditor had exhausted his remedies at law.

In *Hollins v. Coal & Iron Co.*, 150 U. S., 371, a receiver was asked, and the object of the suit was the recovery of unpaid stock subscriptions, and the Supreme Court of the United States held:

“The rule that simple contract creditors can not reach the property of their debtor in equity, until after they have obtained judgment on their claims, applies to a case where the debtor is a corporation and the unpaid stock subscription is sought to be reached.”

In *Bigelow v. Andress*, 31 Ill., 322, 344, it was held:

“The complainants having no judgment, execution, or even lien on the property, they occupy the same situation as any other simple contract creditor, and an allegation of danger of loss could not give jurisdiction in such a case. The current, as well as the weight of authority, both in Great Britain and this country, seems to be that a court of equity will not interfere until the plaintiff has secured judgment; if he desires to have a fraudulent obstruction removed, or if it is to subject an equitable estate, not liable to sale or execution, he must exhaust his legal remedies by obtaining a judgment, and a return of ‘*nulla bona*’ before a court of equity will afford such relief.”

Guided by these authorities, we know of no reason why these cross-petitioners should be permitted, through the equitable remedy of a receiver, to proceed either against the stockholders direct, or indirectly through the corporation, in an endeavor to subject the unpaid balance of stock subscriptions to their claims.

The defendant in error contends, however, that as the court acquired equitable jurisdiction, it will retain the bill and grant all proper relief, and for this reason the appointment of a receiver is to be upheld. It is generally true, that when equity once acquires jurisdiction of a matter, it retains it for the purpose of granting all proper relief. This principle proceeds upon the theory that equity discountenances a multiplicity of suits, and also because it requires no other court to do its work; but one of the fundamental considerations is, that the court shall have jurisdiction in the first instance.

Furthermore, equity never seeks to act in contravention of law, nor does it seek to confer jurisdiction upon itself, when it appears by the pleadings or evidence, that there is an ample remedy at law.

The petition of plaintiff, as stated at the outset, contained two causes of action, one of which was equitable in its nature, and the other legal. The statement of counsel for plaintiff apprised the court that as to him the action was abandoned, and that the plaintiff had no interest in the motion for the appointment of a receiver. The petition, however, does not appear to be dismissed, and if, for that reason, it be said the action is not abandoned, still the *res*, with reference to which relief is sought, being beyond the jurisdiction, and defendant corporation being a foreign corporation, the court could not entertain the action, because no decree entered by it could be made effective. Obviously, a decree against the managing agent would not affect the contract with the corporation, and a decree against the corporation could not be enforced because the court could not enforce a forfeiture of defendant's charter.

In *Penn v. Hayward*, 14 Ohio St., 302, it was held:

"Where part only of the persons from whom a conveyance is required, are residents of the state, and the court has not acquired jurisdiction over the persons of the non-residents, so that complete relief can not be had in that suit, the cause will be dismissed; especially where no real necessity exists for trenching upon the rule discountenancing multiplicity of suits."

And in *North State Copper & Gold Min. Co. v. Field*, 64 Md., 151 (20 Atl. Rep., 1039), the court said:

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"It was not the intention of our statutes to give our court jurisdiction over the internal affairs of a foreign corporation; our courts have no visitorial powers over them, and can enforce no forfeiture of the charter for violation of law, or removal of officers for misconduct."

Eliminating, therefore, the equitable cause of action, there remains in the petition a simple action for debt—a purely legal cause of action. It is scarcely necessary to add that the mere allegation of insolvency made by plaintiff established no right to equitable relief. Upon what ground then, can the cross-petitioners, suing for unliquidated damages, come into the action, and insist upon equitable relief? They too, are simple contract creditors. The cross-petitions are in no sense germane to the original bill, and add nothing to the jurisdiction. The damages sought are peculiarly matters within the purview of a law court and a jury, and ordinarily are not for a chancellor. The parties have certain remedies at law which they have not exhausted, as a matter of fact which they have not even attempted to enforce. Under such circumstances, equity will not afford relief. The remedies provided by law in the creditors' behalf, must be complied with and exhausted, and it must appear to the chancellor that this has been done before equity will entertain the action as a "creditor's bill" in aid of execution, in which other creditors have a right to intervene.

It follows, therefore, that there was no more ground for the cross-petitioners to come into this action than there would be in any ordinary legal action instituted by a creditor.

Finally, while it is true, equitable defenses as well as legal defenses may be waived, we find nothing in the record to justify the contention that there was a waiver by the corporation. For the reasons herein set forth, we are of opinion that the court erred, to the prejudice of the plaintiff in error, in the appointment of a receiver herein, and said judgment is accordingly reversed and the appointment of the receiver is vacated and held for naught, and it is so ordered.

Charles M. Leslie, for plaintiff in error.

Charles F. Williams, for defendant in error.

Charles B. Wilby, for cross-petitioners.

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Iron Molders' Union v. Greenwald Co.

ENJOINING STRIKERS.

[Superior Court of Cincinnati, General Term.]

THE IRON MOLDERS' UNION OF NORTH AMERICA ET AL V. THE
I. & E. GREENWALD COMPANY.

Decided, April 28, 1906.

Contempt—Power of Court to Punish Strikers Guilty of—Jurisdiction Complete—Conduct Against which Injunctions will Lie—Peaceable Enticement Away of Employes not Unlawful—Use of Money not Unlawful, When—Motive of Strikers—Degree of Proof Necessary to Convict—Sections 5640 and 5649—What Constitutes Unlawful Persuasion.

1. A court of record has complete jurisdiction, and inherent power to punish for contempt, in the case of an employer who complains of interference with his business and irreparable injury thereto by strikers and members of a labor union; the question on review of proceedings in this case is, whether the evidence sustains the judgment which was rendered.
2. Where the record shows that the acts of which the defendant strikers and their leaders have been found guilty consisted in peacefully enticing employes to leave their employment when not under contract to remain, and in giving them railroad tickets and money for traveling expenses to go to another city with their families, a finding that such conduct was unlawful persuasion and in contempt of a previous order of court which enjoined against unlawful persuasion, will be reversed on the ground that the defendants were acting within their rights.
3. In considering the conduct of the persons charged with unlawful persuasion the motives with which the person acted are immaterial, if it appears that such person was in the exercise of a clear legal right or in the performance of a duty.

FERRIS, J.; HOFFHEIMER, J., and LITTLEFORD, J., concur in separate opinions.

The I. & E. Greenwald Company instituted a suit against the Iron Molders' Union of North America and other defendants charging the commission of unlawful acts and acts about to be

committed that would work irreparable injury to them, and sought injunctive relief, which the court granted in special term, whereby the defendants (below) were enjoined, among other things, from all interference with the business of the Greenwald Company; from compelling or inducing, or attempting to compel or induce, by threats, intimidation, force, violence or unlawful persuasion, any person or persons whomsoever from in any way obstructing the operation of the business of the I. & E. Greenwald Company.

The preliminary restraining order was issued on September 30, 1904, and a copy of the same was served upon the defendants. From this order no petition in error was filed and no attempt was made to have the order of injunction modified or reviewed.

This was the condition of matters until the 14th day of August, 1905, when written charges in contempt were filed against two of the defendants—Henry Hinnenkamp, described in the original proceeding as being a "business agent," and John R. O'Leary, described as the third vice-president of the Iron Molders' Union of North America. The specifications recited that they had disobeyed, resisted and violated the temporary injunction in this, to-wit:

"That the said men above named on or about the 17th day of July, 1905, accosted John East and Frank Reid, and by giving said parties membership tickets to the union and paying them a sum of money—one giving railroad fares to said parties and their wives to Cleveland, Ohio—succeeded in inducing the said John East and Frank Reid to break their contracts with plaintiff and leave plaintiff's employ.

"That the said parties have also been interfering with other employees of plaintiff to induce them to leave plaintiff's employ."

Upon these charges a hearing was regularly had before the trial judge in the original proceeding, and on August 28, 1905, upon completion of the testimony, the defendants were found guilty of contempt in having violated the injunction of September 30, 1904. A motion for a new trial was filed, an entry made overruling the same, and on August 30, 1905, a transcript

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of the docket and journal entries and original papers, and bill of exceptions with transcript of additional docket and journal entries were filed in this court.

It will thus be seen that the sole issue made by these proceedings in error relates to the proceedings and judgment in contempt, which the petition in error seeks to have here reversed.

It is conceded as an elementary proposition that the plaintiffs in error can not in this proceeding question the validity of the injunction. All courts have the inherent power to punish contempts—such power being essential to the very existence of courts.

“This inherent and necessary power can be exercised by a superior court independently of constituted authority, and such courts may go beyond the power given by statute in order to preserve and enforce the constitutional powers when acts of contempt invade it.” Rappalge on Contempts, page 2.

The authorities are clear in limiting the scope of the authority of an appellate court in contempt proceedings. The validity of an injunction, it would be admitted, could be attacked when it appeared that the court making the order had no jurisdiction over the parties or the subject-matter. Such judgments and orders thus made are regarded as nullities. They are not voidable, they are simple void; but in such cases courts are not called upon to say whether the court decided right or not in granting the injunction. High on Injunctions, Section 416; Beach on Injunctions, Section 247.

The case presented by the petition in error shows complete jurisdiction in special term, both over the persons and the subject-matter. Section 5581 of the Revised Statutes of Ohio provides that:

“An injunction or restraining order granted by a judge may be enforced as the act of the court, and disobedience thereof may be punished by the court or any judge who might have granted it in vacation, as a contempt.”

In the absence of such statutory authority a review might be limited to the consideration of questions of jurisdiction, but

under this statute no ground can be found for questioning the jurisdiction of the court in making the order complained of, and there remains, therefore, but a single question for consideration, to-wit: Were the men charged with contempt guilty of a violation of the order of injunction as issued?

A contempt proceeding is a special proceeding. The Legislature in considering "contempts of court" defined in Sections 5639, Revised Statutes of Ohio, the acts that would receive summary punishment, and in the following section (5640) defined what acts were contempts of court, and outlined the methods of procedure in such matters, and concluding with Section 5649, where the following language was employed:

"The judgments and orders of the court or officer, made in cases of contempt, may be reviewed on error."

Proceedings under this act have been the subject of judicial review on frequent occasions by our Supreme Court. Syllabus 3 in *Myers v. State*, 46 O. S., provides that: "A proceeding to punish for contempt under 5639 * * * may be reviewed on error," and at page 491, the broad language is used that: "The judgments of all inferior courts are subject to review."

In *Brimson v. State*, 63 O. S., 347, the syllabus reads that—

"A judgment of the circuit court * * * in a contempt proceeding may, by virtue of Section 5649 of the Revised Statutes of Ohio, be reviewed in this court."

In that case the plaintiff in error had been adjudged guilty of contempt, by the court, and ordered to pay costs and a fine. Error was prosecuted from the judgment, and a motion made to dismiss the case on the ground that the court had no jurisdiction, to which the court replied, on page 348:

"We consider the point not well taken. Contempt is *quasi* criminal in its nature. The actions embraced * * * are of a civil nature and hence do not include proceedings in contempt and as Section 5649 provides *without qualification* the judgment and orders of a court or officers made in cases of contempt may be reviewed on error, and as there appears no reason to limit such review to any particular court, it would follow that sentence in contempt imposed by the court of com-

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mon pleas and affirmed by the circuit court may be reviewed by this court."

The case of *Hale v. State*, 55 O. S., page 217, furnishes authority that contempt of court finds the inherent power of punishment in the court itself. That case holds that the "General Assembly is without authority to abridge such power," the facts in that case while not furnishing a parallel to the case at bar are interesting and extremely instructive in furnishing authority for the right of review in contempt proceedings. The present chief justice of the Supreme Court said:

"In the case before us a court created by the Constitution punished summarily as for a contempt one guilty of a wrongful act which interfered with the exercise of its jurisdiction. Upon a careful examination of the reported cases we find but one which seems to deny its power to do so. We are not concerned with cases which hold that the power may be exercised by courts or legislative bodies only when they are proceeding within the sphere of duty when the alleged contempt is committed. However clear it may seem from a consideration of the principles involved, that the authority conferred by the Constitution upon the Legislature to create additional courts has reference only to courts with all the attributes and inherent powers that are requisite to the efficient performance of judicial duties, we are not now concerned with any reported case which holds that the Legislature may create a judicial tribunal without power to enforce respect for its sessions, its writs or its process.

"We are mindful that in reviewing the judgment of the circuit court in this case we are exercising jurisdiction conferred by the statute, as was the circuit court when it reviewed the judgment of the court of common pleas. This we do without doubt as to the validity of the statute which authorizes the review. It does not in any manner or to any degree limit the power of the judicial department of the government of the state. Its object is to diminish as much as may be the liability of the power to abuse, but without assuming a revisory authority in another department."

The language of the statute (construed to justify a review of the facts upon which the court predicates its order) makes it necessary to examine the evidence to determine whether the

same sustains the judgment rendered in special term. The injunction order commanded the defendants, their confederates, servants and agents, and any and all other persons aiding and abetting them, to desist and refrain from—

1. Hindering, obstructing or stopping any of the business of the plaintiff in this city, county or elsewhere.

2. In any manner interfering with the plaintiff company in carrying on its business in the ordinary and usual way.

3. Going either singly or collectively to the homes of the employes of the plaintiff company, or any or either of them, for the purpose of and in such a manner as to intimidate, coerce or unlawfully persuade any of said employes to leave the employment of the plaintiff company.

4. Compelling or inducing by threats, intimidation, force, violence or unlawful persuasion, from freely continuing in the service or employment of the defendant company.

The record containing the testimony upon which conviction was had fails to disclose any act of violence, but the court's finding recites that: "The defendants named have violated each and every one of the hereinbefore quoted prohibitions of the injunction order." And it further finds that the defendants below had "seduced away plaintiff's employes for the purpose of aiding the strike and thus directly hindered and obstructed, and unlawfully interfered with plaintiff's business." And the court further found from the testimony that one of the defendants had violated the injunction by his own admission of having paid money and procured railroad tickets as an inducement to the men for quitting the employment of the Greenwald Company. The evidence bearing upon what the defendants did in their attempts to induce employes of the plaintiff to quit its service, either by violence, threats, intimidation or persuasion, was introduced under charges 3, 4, 8, 9, 11, 12, 15 and 16, and the testimony does establish the fact that East and Reid were molders in the employ of the Greenwald Company up to July of 1905, and while so employed as day laborers they were approached by two of the defendants in error who endeavored by various inducements to have them unite with the union and

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thus cease working for the Greenwald Company. In what was done in this connection the record fails to disclose any evidence of fraud or a breach of contract, and does indicate a disposition on the part of the representatives of the union to have these men unite with them in a movement that was beneficial to the men and the union, while depriving the Greenwald Company of their services, though not in violation of the terms of any contract.

It will be admitted that there is authority denying the right of Hinnenkamp and O'Leary to induce men to a line of action that necessitates loss to the employer by reason of deprivation of services of the employee. Many of these cases are made to depend upon the question of motive, and in this state the law is established by frequent decisions of our Supreme Court that the motive with which an act is done is immaterial, and that to make an act unlawful, the act itself must be an infringement on the legal rights of the Greenwald Company.

In 12 O. S., 249, it was held that:

"The act, to-wit, the use of his own property, being lawful in itself, the motive with which the act is done is in law a matter of indifference."

In 54 O. S., at page 82, the Supreme Court said that:

"Courts can not regulate or control the moral conduct of a man unless authorized so to do by statute."

And in 57 O. S., at page 327, the doctrine was again announced that:

"When a person has a legal right to do a certain act, the motive with which it is done is immaterial."

So, in 70 O. S., at 164, the court again said:

"It is immaterial by what motive one is prompted in the exercise of a clear legal right or the performance of a duty."

And this court speaking in general term, in 2 Disney 153, said:

"An act done maliciously or fraudulently will not furnish a ground of action if it is not itself unlawful; there must be legal damage resulting."

And many courts have united in holding that in the absence of contract between the company and employes, that inducing men to quit the service was not actionable, even though done with intent to injure. 13 Lea, 507; 35 At. Rep., 53; 68 Vt., 219.

In 47 N. J. Eq. Rep., at page 519, syllabus 4, it was held that injunctive relief would not lie to require admission of certain persons into an association, or to enjoin them from attempting to coerce or intimidate certain persons from employing stone cutters. The court held, syllabus 4, that:

"This court will not interfere by injunction to restrain acts of the association on the ground that they may be detrimental to trade or injurious to individual business, when it appears that the acts done or threatened are declared by statute as not unlawful."

The court's order enjoined against the doing of the unlawful, not the lawful, and we are concerned, therefore, with the consideration of what the defendants could lawfully do. The evidence is clear and very convincing on the part of the persons charged with contempt that their motive was the securing of better conditions for the members of their organization. That is not unlawful. This they had the right to do, and while the law does not consider motives, it was entirely proper for them to show by competent testimony what their purpose was. And the law has defined the extent to which the acts may go regardless of motive. The men approached to join the union were not under contract for a definite term, and, therefore, it was entirely in the right and not in violation of any law for Hinnenkamp and O'Leary to use peaceable persuasion and argument to induce them to unite with the union, although the effect of the same would be manifestly to deprive Greenwald & Company of their services. Such cases are not rare. When men have been induced to leave employment at the expiration of the time for which they were hired, such acts are not within the prohibi-

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tions of the law. Wood on Master and Servant, Section 236, p. 457; 75 Me., 225.

The Iron Molders' Union is not an unlawful combination. It is a legal union. Its representatives had a right to engage in conversation men who were in the service of the Greenwald Company in an endeavor to induce them to leave their employment at the expiration of their contract for services. They had a right, in a peaceable, orderly manner, to present such arguments and reasons to East and Reid as would induce them to unite in an effort to better their conditions, to make more tolerable rules, to secure a greater wage and a shorter hour, and having done this without violence or coercion or threats or intimidation, they were not guilty of violation of that part of the court's order enjoining against unlawful persuasion. These things, under the decisions, they have the right to do. It is lawful persuasion. The authorities on this subject are collated by High on Injunction, Section 1415i. At page 1420 the author says:

"Moreover, striking employes or their sympathizers have the undoubted right, so long as they persuade in a peaceful and orderly manner, to resort to all manner of peaceful persuasion for the purpose of inducing plaintiff's employes to leave his service or those who wish to enter his employ from so doing. Accordingly, in the absence of threats, intimidation, violence or other unlawful coercive measures an injunction will not restrain such conduct upon the part of defendants." *Arthur v. Oaks*, 11 C. C. A., 209; 63 Fed. Rep., 310; 25 L. R. A., 414; 23 Fed., 748.

In this last case Justice Brewer makes the proper distinction as to where persuasion ceases and coercion begins. In syllabus 1, at page 750, he says:

"Where employes of a railroad company in the hands of a receiver appointed by the court are dissatisfied with the wages paid by the receiver, they may abandon the employment and by persuasion or argument induce other employes to do the same. The real question is, whether these parties went there simply as persons have a right to do to request engineers and trainmen to desist from further labor, or whether they went there under the circumstances with such a demonstration of force, such an

attitude and air that although nothing but a request was expressed, it was a request which the men did not dare decline to comply with."

This superior court held, in — W. L. B., 32, that it was "lawful for workmen to endeavor by reasonable argument and persuasion to induce others who have not hitherto acted with them, to do so."

The court below found that what the union did amounted to a hindrance and an obstruction and was an unlawful interference with the plaintiff's business, and, therefore, held that "persuasion with such object in view was clearly unlawful and was in violation of the court's order." But such definition leaves no room for the application of the doctrine that a "court of chancery will not enjoin the enticement away of employes even where the admitted purpose of the enticers is by a preconceived plan to injure the employer in his business *provided the enticement is effected by mere persuasion or argument.*"

Courts of equity recognize this distinction. The most frequently quoted work on combinations is Eddy. At page 1173, Volume 2, Section 1031, the rule is stated as follows:

"Where there is no sufficient evidence of violence, force, intimidation or coercion, and the facts simply show that the parties complained of are persuading workmen still employed to quit their employment, and others about to accept employment not to do so, and that the persuasion consisted of arguments, personal appeals and inducements by way of payment of traveling expenses to other localities, an injunction will not be granted."

The same doctrine finds a clear expression in the case of *The Otis Steel Co. v. Local Union No. 218*, 110 Fed. Rep., 700, where it is said:

"There is an undoubted right in the members of such organizations to promulgate their theories by reason, logic, argument, and the persuasive influence of those peaceful weapons to the end that other men may be brought to think as they do. When that persuasion has been accomplished the men persuaded may evidence such fact by joining the organization whose principles and theories they come to believe." 34 Am. St. Rep., 678.

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In *Murdock v. Walker*, 152 Pa. St., 595, it was held:

"That the right of workingmen to organize into associations can not be questioned, and the right of the members of such associations, either as members or as an organization, to cease work for an employer and to use all lawful and peaceable means to induce others to refuse to work for such an employer, are equally well founded."

And in 118 Michigan, at 421, the court says:

"Laborers may use persuasion to induce men to join their organization, or to refuse to work except for an established wage. They may present their case to the public in newspapers or circulars in a peaceable way and with no attempt at coercion."

A case frequently referred to in the authorities defining persuasion and the right to lawfully persuade men is found in 131 Mo., page 212, where the court by its injunction had prevented certain strikers from attempting to coerce employes to leave their work and join the strike, said:

"The injunction in this case does not hinder the defendants doing anything that they claim they have the right to do. They are free men and have the right to quit the employ of the plaintiffs whenever they see fit to do so, and no one can prevent them. They have a right to use fair persuasion to induce others to join them in their quitting; but when fair persuasion is exhausted, they have no right to resort to force or threats or violence."

Judge Grinnin, reviewing the authorities on this subject, says, in the case recently decided of *Waddey v. Typographical Union*:

"I do not find that courts of equity enjoin peaceful enticements, even when accomplished by money reward. * * * My conclusion on this branch of the case is that so long as the defendants attempt to induce the new employes to leave their employers by fair and peaceable persuasion only, they are guilty of no act which a court of equity will enjoin."

Admitting, therefore, all that is claimed by counsel in this behalf, that the men found guilty of unlawful persuasion had

made attempts to induce employes to leave the employment at the end of their contract; granting that the testimony shows that sums of money were paid in cash to the employes of the Greenwald Company, who were furnished with railroad tickets that they might leave the city and the employment of the Greenwald Company; admitting that certain offers were made to them for the express purpose of inducing them to join the union and consequently leave the employment of the defendant in error, we find under the authorities nothing unlawful in such conduct. The payment of money furnishes no authority for their conviction. It is not unlawful, because they had the right to do it under the circumstances as shown by the evidence. A leading text-writer on the subject of injunction says:

“For the same reason equity will not enjoin strikers from offering to pay money to such of plaintiff’s employes as are persuaded to leave his services, nor will the relief be granted to restrain the posting or publishing the names of persons who refuse to subscribe to funds raised for the purpose of benefitting strikers or for the purpose of carrying on strikes.” High on Injunctions, Section 1415; 17 N. Y. Supp., 264; 9 Abbott, 363; 123 Fed Rep., 656; 18 Am & Eng. Enc. L., 87.

The plaintiffs in error were convicted below upon such facts because the court construed their conduct to be unlawful persuasion and because “such being the law, it is plain that the defendants named have violated each and every one of the hereinbefore quoted prohibitions of the injunctive order.”

We do not so apprehend the law, and being of the opinion that the expression “unlawful persuasion” has received the legal interpretation herein claimed, wherein obligations resting upon the defendants below were fixed and defined by the law; and being of opinion that the record fails to disclose a violation of any duty or obligation against which they were legally enjoined; and further finding from the testimony that no contract was violated, and that the arguments and persuasive efforts made, unaccompanied by force, threats or violence, were not illegal, we, therefore, hold there was no violation of the court’s order.

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For these reasons we believe that the defendants have not been shown to have violated the injunction of September 30, 1904.

HOFFHEIMER, J.

The contention of defendant in error, that the judgment in contempt is not reviewable in this court, for the reason that such proceeding is in effect a collateral attack on the decree of injunction, is not in my judgment tenable. The question before us is not as to the correctness or regularity of the decree originally granted. That decree was not made the predicate of error. The sole question before us is: "Was the judgment of the court in the contempt proceedings, which proceedings were instituted under Section 5640, Revised Statutes of Ohio, erroneous, in finding Hinnenkamp and O'Leary guilty of a violation of the decree? The review of contempt proceedings in this state is governed by statute. The order of the court below was a final order (Section 6707, Revised Statutes), and as such is reviewable by virtue of Section 5649, Revised Statutes. The cause, therefore, stands for review like any other proceeding in error properly before this court.

Plaintiffs in error were charged in writing with having violated the decree issued by the court below. The charge, therefore, became the basis for proceedings of a *quasi* criminal nature, and before the men could legally be adjudged guilty of a violation of the decree the *quantum* of evidence must be such as the law demands in actions of such character. As the proceeding is one involving personal liberty, strict construction is required (62 O. S., 296), and, therefore, if these men are to be punished at all, it must be because they have been duly proven to have been guilty of some act with which they have been charged and which act the court in its decree had enjoined.

In considering the question at issue I am not unmindful that a flagrant and wanton disregard of an injunction issued by a

court with proper jurisdiction of the parties and the subject-matter is a matter, that according to fundamental principles, is inherently within the power of the court to punish. This must be so, *ex necessitate*, in order to maintain the power, efficiency and integrity of the courts. But the personal liberty of the subject is also of prime importance and it can not be restrained, unless it appears beyond doubt in a proper proceeding that an injunction granted in due course had been actually violated and disregarded by the individual.

During the presentation of this cause it was practically conceded that if Hinnenkamp and O'Leary had violated any section of the decree, it was paragraph 4. Said paragraph is as follows:

"Also from compelling or inducing or attempting to compel or induce by threats, intimidation, ~~persuasion~~, force, violence or unlawful persuasion, any of the employees of the I. & E. Greenwald Company to leave its service."

The scope of the injunction, therefore, is directed against unlawful persuasion, and it is a violation of this injunction with which the men stood charged. In considering the evidence, therefore, the significance or treatment of the term "unlawful persuasion" is at once involved. Does the evidence show that Hinnenkamp and O'Leary violated the terms of the injunction and were guilty of unlawful persuasion? Was the evidence sufficient to warrant conviction?

The term *unlawful persuasion* has a technical legal significance. What constitutes unlawful persuasion in some jurisdictions is not unlawful in others. For example, we find frequently cited in the decisions the case of *Taff-Vale Railway Co. et al v. Amalgamated Societies of Railway Servants et al* (1901), Appeal Cases H. L., 426, as an exposition of the English idea. Indeed, we are cited to it in this case as an expression of the highest English court upon the subject. In that case the injunction restrained the defendant labor union, its servants, agents and others acting by its authority from watching or causing to be watched or beset the Great Western Railway station at Cardiff,

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or the works of the plaintiff, or any of them, or the approaches thereto, or the place of residence or any place where they might happen to be, of any workman employed or proposing to work, for plaintiff, for the purpose of *persuading* or otherwise preventing the person from working for the plaintiff or for any other purpose except merely to obtain or communicate information, and from procuring any person who had or might enter into any contracts with the plaintiff to commit a breach of such contracts. This injunction, it appears, was sustained by the House of Lords, without dissent.

Thus it is seen that this celebrated case enjoins persuasion even by peaceful means. Nor does this case stand alone. But the principle of this case is not generally accepted by the American courts. In 6 Pomeroy's Equity Jurisprudence, Par. 595 (edition just published, 1906), I find the following:

"The American courts generally agree that interference with the employe's right to continue in employment or in the employer's right to have such continued employment not under contract, where such interference is by direct coercion or intimidation of the employe, is ground for injunction. But when the interference with these rights is by persuasion and peaceful means, it is not generally in the American courts considered unlawful and an injunction will not be given."

See *Fletcher v. Association of Machinists* (N. J. Ch.), 55 Atl., 1077; *Foster v. Retail Clerks Association*, 39 Misc. Rep., 48; *Bohn Mfg. Co. v. Hollis*, 54 Minn., 223; 40 American State Reports, 319; 55 N. W., 1119; 21 L. R. A., 337; *Rodgers v. Evarts*, 17 N. Y. Supp., 264; *Reynolds v. Everett*, 144 N. Y., 89.

The authority cited points out that in England the injunction extends to interference by persuasion (citing *Taff-Vale Railway Co. v. Amalgamated Societies of Railway Servants*, *supra*), and adds:

"*But this extension rests upon an act of parliament.*" (Act of 1876.)

In examining the status of labor unions in our own state we find that the policy of our law favors them. Section 4364-68, Revised Statutes of Ohio, is as follows:

"It shall be unlawful for any individual or member of any firm, or agent, officer or employe of any company or corporation to prevent employes from forming or joining and belonging to any lawful labor organization, and any such individual, member, agent, officer or employe that coerces or attempts to coerce employes by discharging or threatening to discharge from their employ or the employ of any firm, company or corporation because of their connection with such lawful organization shall be guilty of a misdemeanor and upon conviction thereof in any court of competent jurisdiction shall be fined in a sum not exceeding one hundred dollars or imprisonment for not more than six months or both in discretion of the court."

By necessary implication the labor union has the right to invite members to join the unions. This being so, if the persuasion is peaceful (that which the law countenances) what difference does it make what the motives of those who engage in such persuasion may be?

Defendant in error earnestly contends that *any persuasion which has for its immediate and direct purpose and effect an injury to the complainant in his business or occupation by causing persons to leave his employ is unlawful persuasion*. Can this be true? Can the motive with which a person acts in the clear exercise of a legal right become material in working out the true solution of the difficult and vexatious problem before this court? It seems to be established beyond cavil that it is immaterial by what motive one is prompted in the exercise of a clear legal right or in the performance of a duty. Such was the language of Shauck, now chief justice of Ohio, in *Lancaster v. Hamberger*, 70 O. S., 156, 164. See also *Frazier v. Brown*, 12 O. S., 294; *Letts v. Kessler*, 54 O. S., 73 (spite fence case); *Kelly v. Ohio Oil Co.*, 57 O. S., 327.

As was said in *Bohn Mfg. Co. v. Hollis*, *supra*, the exercise by one man of a legal right can not be a legal wrong to another, or as was said in another case: "Malicious motives make a bad case worse, but they can not make that wrong which in its own essence is lawful." *Heywood v. Tillson*, 75 N. E., 225; *Phelps v. Nowlen*, 72 N. Y., 39; *Jenkins v. Fowler*, 23 Pa. St., 308.

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It can make no difference what the evidence may show the motives of Hinnenkamp and O'Leary to have been in persuading East and Reed to join the union and leave the service of the Greenwald Company. The question of motive is immaterial and can not be considered. The testimony substantially shows that the two employes, East and Reed, were induced by Hinnenkamp and O'Leary by means of argument and inducements (railroad tickets and expenses) to join the union and thus leave the service of the I. & E. Greenwald Company. The men were not under *contract* with the I. & E. Greenwald Company. Mr. Greenwald himself testifies that the men were not under any particular agreement (Record, p. 4), and that they received wages of three dollars a day. There was no force, no violence, no intimidation in what plaintiffs in error did. There were no threats unless it can be said there was what is termed a *veiled threat* in the use of the phrase "straightened up," as it appears to have been several times used by these men. For example, see testimony of East (Record, p. 12):

"Q. Just detail to the court how, when and what was said and done? A. Mr. O'Leary called and bid us the time of day and in the conversation he asked me if I wanted to be straightened up, and I replied to him that I hadn't thought of it very seriously, and there was very little if anything said that night in regard to it any more than he asked me if I would care to have him meet me and give him the number of my room.

"Q. And when next did you hear from any member of the union? A. The next evening I met Mr. Hinnenkamp.

"Q. Where was this that you met Mr. Hinnenkamp? A. At my own house.

"Q. And what was said? A. I did not know the gentleman until he introduced himself and of course I knew who he was then because Mr. O'Leary had told me that he might call himself and I had heard of Mr. Hinnenkamp, and when I found out who he was I asked him in. We sat down and talked for a few minutes and he asked me what offer he could make for to straighten me up to take a union card and leave town.

"Q. What did you say to that? A. I told him if he cared to make an offer I would consider it. So he made me a proposition, which I accepted."

Considering the testimony as to the arguments used to persuade these men to join the union and leave the service of Greenwald, bearing in mind the men had no contract with Greenwald, that inducements (railway tickets and expenses) were given, and language such as the kind pointed out was used, can we say that the men resorted to what the law recognizes as unlawful persuasion?

The offering and giving, what some courts term, "bribes," of the character of those given in the case at bar, is not of itself unlawful. The so-called "bribes" were nothing more nor less than inducements by way of expenses. This was determined in several cases, and in *Waddy v. Richmond Typographical Union No. 90* (1905, Va), several of the decisions so holding are set forth. This case I am informed, has been but recently affirmed by the appellate court (Caldwell, J.)

See, also, *Rogers v. Evarts, supra*, Syl. 4; Eddy on Combinations, Section 1031; *U. S. v. Kane*, 23 Fed. Rep., 748.

In *Otis Steel Co. v. Local Union No. 218* (110 Fed. Rep., 700), Wing, J., speaking with reference to persuasion said:

"There are at the foundation of all labor organizations, as there are at the foundation of religious organizations and of the innumerable other forms of social organizations, certain ideas peculiar to each and there is an undoubted right in the members of such organizations to promulgate their theories by reasonable legitimate argument and the persuasive influence of those peaceful weapons to the end that other men may be brought to think as they do."

In *Beck v. Teamsters Protective Union*, 118 Mich., 497, 517, Grant, C. J., said:

"So also the laborers have the right to fix a price upon their labor and refuse to work unless that price is obtained. Singly or in combination they have this right. They may organize in order to improve their condition and secure better wages. They may use persuasion to induce men to join their organization or refuse to work except for an established wage. They may present their cause to the public in newspapers or in a peaceable way and with no attempt at coercion. If the effect of such

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case is ruin to the employer, it is *damnum absque injuria* if they have only exercised their legal rights. The law does not permit either party to use force, violence, threats of force or violence, intimidation or coercion. The right to trade and the personal liberty of the employer alone are not involved in this case; the right of the laborer to sell his labor when and to whom and for what price he chooses is involved."

In *Hamilton-Brown Shoe Co. v. Saxe*, 131 Mo., 212, the court said—

"They have the right to use fair persuasion to induce others to join them in their quitting, but when fair persuasion is exhausted they have no right to resort to force or threats of violence. The law will protect their freedom and their rights, but it will not permit them to destroy the freedom and rights of others.

"The same law which guarantees the defendants in their right to quit the employment of the plaintiffs at their own will and pleasure, also guarantees the other employes the right to remain at their will and pleasure. These defendants are their own masters but they are not the masters of the other employes, and not only are they not masters of the other employes but they are not their guardians."

In *Gray v. Building Trades Council*, 63 L. R. A., 733, the court said:

"It must appear that the means used are threatening and intended to overcome the will of others, to compel them to do or refrain from doing that which they would or would not otherwise have done. What amounts to coercion, intimidation or threats of injury must necessarily depend upon the facts of each particular case."

See, also, *Union Pac. R. Co. v. Reuff*, 120 Fed. Rep., 102.

Were, then, the "weapons of persuasion" used in the *particular case under consideration*, under all the circumstances peaceful? What was the effect of the arguments or threats used upon these men? How did they affect them? What were the circumstances? It does not appear that the men, East and Reed, were at any time in fear. It can not be said that they

were coerced in the ordinary meaning of that term or that they acted because of fear or coercion. Their judgment, will and freedom of action does not appear to have been subverted or overcome by threats, veiled or otherwise. They were entirely free to choose and to act. They were free to remain with Greenwald, had they elected to do so, or they were free to leave. Nor can it be said from the evidence that they did not exercise their *own* will and their *own* judgment in the final decision. Under the circumstances of this particular case the persuasion used was lawful. The evidence, therefore, did not warrant conviction, and the finding of the court below was, therefore, erroneous. For these reasons and those more fully set forth in the opinion of Ferris, J., I concur in the order of reversal.

1. To induce a man, by argument and by giving him money, to quit his work when he can do so without breaking a contract, there being no compulsion of any sort, no false charges against his employer, and no ill-feeling against his employer, is not *unlawful* persuasion.
2. Proceedings in contempt are *quasi* criminal. The charge against the defendant is strictly construed in his favor. It is error to find a defendant guilty of anything with which he is not charged in the written charges against him.

LITTLEFORD, J.,

On September 30, 1904, the superior court, sitting in special term, enjoined the Iron Molders' Union of North America and others from doing certain acts having the effect of hindering the business of the I. & E. Greenwald Company of Cincinnati. The injunction fully sets forth all of these acts.

No motion to modify this injunction was made, nor was any petition in error filed, so that the injunction in all its terms is in force to this day.

On August 14, 1905, a written charge of contempt was filed against J. F. O'Leary, vice-president of the Iron Molders Union of North America, and Henry Hinnekamp, business agent of

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the Iron Molders Union No. 4, alleging that these two men violated the injunction because—

“That the said men above named on or about the 17th day of July, 1905, accosted John East and Frank Reed, and by giving said parties membership tickets to the union and paying the railroad fares of said parties and their wives to Cleveland, Ohio, succeeded in inducing said John East and Frank Reed to break their contracts with plaintiff and to leave plaintiff's employ.

“That the said parties have also been interfering with other employes of plaintiff and inducing them to leave plaintiff's employ.”

There was no evidence to support the latter charge, and it, therefore, does not cut any figure here.

After a hearing, the court found that “it is plain that the defendants named have violated each and every one of the hereinbefore quoted prohibitions of the injunction order.” The prohibitions referred to are given near the beginning of the opinion and are as follows:

“1. Hindering, obstructing or stopping any of the business of plaintiff in this city, county or elsewhere.

“2. In any manner interfering with the plaintiff company in carrying on its business in the usual and ordinary way.

“3. Going either singly or collectively to the homes of the employes of the plaintiff company, or any or either of them, for the purpose of, and in such manner as to intimidate, coerce or unlawfully persuade any of said employes to leave the employment of the plaintiff company:

“4. Compelling or inducing by threats, intimidation, force, violence or unlawful persuasion, from freely continuing in the service or employment of the plaintiff company.”

It will be seen that the defendants are not accused in the written charge of doing any of those things spoken of in paragraphs 1, 2 and 3. It is doubtful if the written charge accuses them of doing what is forbidden in paragraph 4. To find the defendants guilty of anything with which they are not charged in the written charge against them is alone sufficient to reverse the judgment of the court below.

After overruling the motion for a new trial, the court fined O'Leary and Hinnenkamp one hundred dollars each. This judgment of the court now comes before the general term on error.

It is conceded on all sides that the soundness of the injunction granted by the court below can not be questioned in this proceeding; but the injunction of a court in a prosecution for contempt on written charges filed under Section 5640, Revised Statutes, may be reviewed on error. Section 5649, Revised Statutes, so provides.

The only part of the injunction which forbids the defendants from compelling or inducing the employes of the Greenwald Company to leave its services is as follows:

"Also from compelling or inducing or attempting to compel or induce by threats, intimidation, force, violence or unlawful persuasion any of the employes of the I. & E. Greenwald Company to leave its service."

Proceedings in contempt are *quasi* criminal; the charge against the defendant is strictly construed in his favor. In this case these defendants can be found guilty only provided they induced East and Reed to leave Greenwald Company's services by *unlawful* persuasion. If they gained this end by lawful persuasion, they are not guilty. A court can not punish as a contempt an act which it has not forbidden. It should be said that there is no claim that threats, intimidation, force or violence were used.

Moreover, before a court can find a defendant guilty of contempt, the charge must be proved beyond a reasonable doubt—that is, the court must "feel an abiding conviction to a moral certainty of the truth of the charge." *Morgan v. State*, 48 O. S., 371.

The evidence in this case shows that O'Leary and Hinnenkamp induced East and Reed, two of the Greenwald Company's men, to quit the company's service by argument, and by giving them tickets to the union, railroad tickets to Cleveland, and money for traveling expenses.

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The question before this court is whether or not this was *unlawful* persuasion.

It is not proved in this case that East and Reed broke any contract with the Greenwald Company. In fact, the evidence discloses that they had the right to quit work when they chose. Nor is it proved that the respondents made any false statements about the Greenwald Company to East and Reed to induce them to leave the company's employ. And, finally, it is not proved that O'Leary and Hinnenkamp were actuated by any ill-will or malice toward the Greenwald Company in what they did. On the contrary, the evidence shows they were moved only by a wish to promote the welfare of the union.

Whether or not a different conclusion from that reached here would be justified had it been proven that the respondents induced East and Reed to break a contract with the Greenwald Company by false charges against the company made with a feeling of malice against it, it is not worth while to discuss. The fact that these things were not proved excludes from consideration many of the cases bearing upon the subject in hand. The plain question then is whether or not it is *unlawful* persuasion to induce a man, by arguments and by giving him money, to quit his work when he has a right to quit, there being no compulsion of any sort, no false charges against his employer, and no ill-will against his employer.

"To persuade is to bring the will of another to a desired decision by some influence exerted upon it short of compulsion." Standard Dictionary.

According to this definition, even giving of money to East and Reed does not make the conduct of O'Leary and Hinnenkamp anything more than persuasion. It was just the same as if they had used arguments alone to get East and Reed to leave the Greenwald Company. The dictionary makes this clear, and the view is sustained by authority also.

"The offer by defendants of money to pay expenses of the employe is lawful. The assistance given to those needing it is

lawful, even if offered as an inducement to the employe to leave." *Rogers et al v. Evarts et al*, 17 N. Y. S., 264, 269.

See also, 2 High on Injunctions (4th Ed., par. 1415i); *Johnston Harvester Co. v. Meinhardt*, 60 How. Pr., 168.

Peaceably persuading a man to quit work when he has a right to quit is not an unlawful thing to do. This has been asserted by courts in this state and elsewhere so often that it is unnecessary to cite any authorities. No court in this or any other country has ever forbidden a man to go peaceably to his neighbor and urge him to give up service which he has the right to quit if he chooses. This is not *unlawful* persuasion.

While it is not proved in this case that O'Leary and Hinnenkamp were moved by ill-will towards the Greenwald Company to do what they did, still, even if they had been, the result would be the same. Malice towards the Greenwald Company would not make the persuasion amount to *unlawful* persuasion.

It is the law of Ohio that if an act may be done lawfully with a good motive, it is just as lawful if done with malice toward another.

A man has a right to build his house on his line, even if he shuts off his neighbor's light and air; and he has just as much right to build a spite fence on his line. *Letts v. Kessler*, 54 O. S., 73-82; *Kelly v. Ohio Oil Co.*, 57 O. S., 327; *Lancaster v. Hamberger*, 70 O. S., 164.

In conclusion, we are of the opinion that O'Leary and Hinnenkamp have not been proved guilty beyond a reasonable doubt of a violation of the injunction herein as set forth in the written charge against them.

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**PETITION BY MUNICIPAL CORPORATION FOR LOCATION
OF COUNTY DITCH.**

[Common Pleas Court of Van Wert County.]

**H. V. COOPER AND E. B. CORATHERS V. THE COMMISSIONERS
OF VAN WERT COUNTY ET AL.***

Decided, July 12, 1905.

County Ditch—Petition for Construction of—Where Presented by Municipal Corporation—Enlarging of Water-course not Authorized—Requirements as to the Bond—Sections 4483 and 4451.

1. Section 4483, Bates' Revised Statutes, does not authorize the deepening, widening or straightening of a water-course by the county commissioners, upon petition of a mayor acting under resolution, in that behalf, of a municipal corporation.
2. The bond to be filed under Section 4483, to support a petition for a ditch improvement, must follow the requirements of Section 4451, and confers no jurisdiction upon the county commissioners unless signed by at least two sufficient sureties.

KILLITS, J.

In May, 1904, the acting mayor of the city of Van Wert filed a petition with the Auditor of Van Wert County, praying the county commissioners to deepen, widen and straighten a certain county ditch, locally known as Town creek, along a route thereof wholly within the limits of the city, and accompanied the petition by a bond signed by the city of Van Wert, through its mayor, the bond being without any other surety. These acts of the acting mayor were pursuant to a resolution of the city council authorizing and directing the same to be done by him, the council assuming to act under the provisions of Section 4483, Revised Statutes. The commissioners, acting

*This case was taken to the circuit court on appeal, and, April 13, 1906, that court found the proceedings before the commissioners to be void for want of sureties on the bond. The holding of the court of common pleas, as to the scope of improvements possible under Section 4483, was neither considered nor criticised by the circuit court.

solely upon this petition and bond, found for the improvement, but changed both termini so as to include many miles of the ditch both above and below the city, and ordered a survey upon the route as so changed. No further or different application for the improvement or bond were filed than those referred to above. A very large expense was incurred for surveys, and in April last the commissioners confirmed the engineer's apportionment, and on the 31st of May ordered that the construction of the improvement be sold. The next day the plaintiffs Cooper and Corathers, who are respectively owners of farm lands without the city limits, beyond the scope of the improvement originally prayed for, but which are apportioned and to be assessed for the cost of location and construction, filed their petition in this court to enjoin the construction of the improvement and the burdening of their respective lands with any of the costs thereof.

The cause is now before the court upon the issues made in the pleadings, and the admissions of fact therein made, and made at the final hearing, which will be referred to as we proceed, so far as they are necessary to an understanding of the decision. Three grounds of relief are urged in behalf of the plaintiffs, namely:

1. That the stream to be improved is a natural water-course, namely, a natural creek, and that the commissioners have no right, under a petition to improve a specified portion of such creek, to extend the termini, citing *Abel v. Commissioners*, 9 Ohio Decisions, 339; 6 Nisi Prius, 349.

2. That no proper bond was filed as required by Section 4451, the bond being without sureties.

3. That Section 4483 confers no authority upon councils of municipalities to direct and empower the mayor to file a petition and bond in the name of the corporation for the *deepening, widening and straightening* of a ditch.

The first contention is disposed of adversely to the plaintiffs by the admission of fact that many years ago a county ditch was laid along the general route of Town creek, and that the

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proposed improvement, as well as that embraced in the mayor's petition, deals with the artificial channel made for this stream when it was so improved as a county ditch. Upon the construction to be given the language of Section 4483, in connection with that of the chapter in which it is found, depends the determination of the remaining contentions of plaintiffs, and at the outset we are found deprived of one very efficient aid to interpretation in doubtful cases in the fact that this section is the work of the codifying commission alone, finding a place in the statutes for the first time in the revision of 1880, and that its provisions never received legislative sanction, so far as we can discover, except as the work of the commission was adopted by the omnibus act of 1879, enacting the laws as codified and revised. Hence, except for the general title of the chapter, we have neither title nor legislative history to which to refer for assistance.

Passing, for the time, the technical objection that the bond was deficient, for a discussion of the larger question involved in the third proposition of plaintiffs, we will now consider whether authority to use the name of the municipality to invoke the jurisdiction of the commissioners to "deepen, widen and straighten" a county ditch is granted by Section 4483. So much of the section as needs interpretation in this behalf reads as follows: "The council of a municipal corporation may, by resolution, authorize the mayor to present a petition, signed by him officially, and a bond, to the county commissioners, to *locate and construct* a ditch described in the resolution," etc. Unless this part of the section is broad enough to warrant the action of the council and the acting mayor in asking the commissioners to "deepen, widen and straighten" Town creek, being a county ditch already located and constructed, the proceedings of the commissioners are void, the plaintiffs are entitled to a decree, for it is not seriously claimed that anywhere else exists authority to the council and mayor to go to the commissioners in the name of the village for such purpose.

Five canons of interpretation are to govern us in the decision of this question:

First. That opportunity for construction of a statute by a court exists only when the language to be considered is vague and ambiguous. If it is plain, it should be construed as it reads, and no notion of the court as to the want of wisdom of its provisions and the desirability to give a meaning to the language to make the statute, in the opinion of the court, more beneficial in its operation, should prevail to change the plain reading. *Slinguff v. Weaver*, 66 Ohio State, 621, 626.

Second. That the rule of strict construction should be employed, this being a statute dealing with the delegation of powers in derogation of the rights of individuals; conferring powers upon inferior bodies which have none save such as are expressly conferred. *Zanesville v. Richards*, 5 Ohio State, 589; *Mays v. Cincinnati*, 1 Ohio State, 269-273; *Pleasant Hill Village v. Commissioners*, 71 Ohio State, 138.

Third. That the statute must be construed in connection with all others with which it is *in pari materia*, and especially in connection with the system of legislation of which it is a part. *Cincinnati v. Connor*, 55 Ohio State, 82-89; *Cincinnati v. Guckenberger*, 60 Ohio State, 353.

Fourth. That, unless the words to be construed have a legal significance differing manifestly from their ordinarily accepted meaning, the latter shall prevail. *Allen v. Little*, 5 Ohio, 65-71; *State v. Peck*, 25 O. S., 28; *Mogle v. Black*, 5 Circuit Court Reports, 54; s. c., 3 C. D., 25, 28.

Fifth. If the particular words and phrases under construction have acquired a fixed legal significance, particularly by statutory usage, such limited meaning and acceptance it is presumed the legislature intended for them. *Turney v. Yecomam*, 14 Ohio, 208, 218; *Grogan v. Garrison*, 27 Ohio State, 50; *Rhodes v. Weldy*, 46 Ohio State, 234.

So well settled are each of these principles, that it were almost supererogatory to cite authorities, certainly so to quote from them. Applying these criteria it is manifest that this statute must be taken just as it is found, using its language as narrowly as it reads, to the exclusion of authority to the

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council to empower and direct the mayor to employ the name of the city in a petition to widen and deepen and straighten this county ditch. It is argued that the words of the statute, "locate and construct a ditch," are so comprehensive as to include anything else to be done less than construction, on the principle that the greater includes the less. The difficulty, however, is not only that these words have an ordinary meaning, in almost exclusive acceptation, distinct from the thought in the words, "widen, deepen and straighten," but in the chapter relating to county ditches, of which Section 4483 is a part, these identical words are used in a legal sense differing from the words "widen, deepen and straighten," as used in the ditch petition in this case. Section 4447 reads, "The commissioners may cause to be located, and constructed, straightened, widened, altered, deepened, boxed, or tiled, any ditch," etc., and we must presume that these various terms were used to describe improvements respectively differing in character to the extent that terms of different meanings were necessary to be used to describe the jurisdiction conferred upon the commissioners. In *Bloom v. Richards*, 2 Ohio State, 388, 402, Judge Thurman said:

"It is a general presumption that every word in a statute was inserted for some purpose. Mere idle and useless repetitions of meaning are not to be supposed, if it can be fairly avoided."

This observation has been so generally approved by subsequent decisions as to have become a cardinal principle of interpretation, with controlling application to the construction of Section 4447. Hence, we can not assume that the words "located and constructed" have either the same meaning with "straightened, widened and deepened," or that the former include the latter. If a limited meaning is to be given to "located and constructed" in Section 4447, the same must be given to "locate and construct" in Section 4483.

Point to this conclusion is found in a consideration of the legislative history of the two sections, 4447 and 4483. The

latter, as we have seen, is wholly the work of the revisers; curiously enough, the addition of the words "straightened, widened and deepened" was first made to what is now 4447 by the same revisers. Up to the time of the revision no act conferring jurisdiction upon the commissioners over ditches used the terms we have quoted. The acts of 1859 (S. & C., 523) and 1871 (68 Ohio Laws, 60), the parent statutes to 4447, conferred upon the commissioners power to "locate and construct" simply. Thus it appears that the same legislative hand which provided for us Section 4483, placed upon the same terms there used an exclusive and limited meaning in Section 4447, a law which is inseparably connected with 4483. The two sections, in this particular, and in effect are part of the same act. Judge Owen, in the syllabus to *Rhodes v. Weldy*, 46 Ohio State, 234, says:

"Where the same word or phrase is used more than once in the same act in relation to the same subject matter, and looking to the same general purpose, if in one connection its meaning is clear and in another it is otherwise doubtful or obscure, it is in the latter case to receive the same construction as in the former, unless there is something in the connection in which it is employed plainly calling for a different construction."

As we have said, the meaning of the language of 4483, in the particular under consideration, is neither "doubtful or obscure," but is, on the contrary, clear and plain; nor is there anything in the circumstances calling for a different construction. In argument counsel for defendants referred us to Section 7 of the Municipal Code (see 1536-100, paragraph 19, Bates' Revised Statutes), whose provisions, in our judgment, plainly suggest that there is no reason why the authority the defendants ask for in this case should be read into 4483. This section of the code provides authority to the city of Van Wert to do itself all, and even more, with Town creek, than was embraced in its petition to the commissioners, involved in this case. It is there provided that the city may

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“enlarge, deepen, straighten, any water-course located in whole or in part within the corporation or lying contiguous or adjacent thereto.” By Section 10 of the code (see 1536-103, paragraph 9, Bates’ Revised Statutes), the city may appropriate property outside of the city for outlet, and by other sections the power of assessment is given to the corporation. The language used by the Supreme Court, in deciding *Village of Pleasant Hill v. Commissioners*, 71 Ohio State, 133, suggests that that court would give to Section 4483, if it were directly before it, the same construction we have. For these reasons we conclude that the petition of the acting mayor, upon which alone the commissioners acted, was filed without authority of law, and that all proceedings thereon by the defendant commissioners are void for want of jurisdiction.

While unnecessary to the decision of this case, we will consider briefly the contention made that the bond was insufficient to confer jurisdiction. Against this claim two arguments are advanced: one, that it is absurd to require sureties on the bond of the city, as the entire taxable valuation of the corporation is behind it; and, second, that the bond having been acted upon as approved and sufficient, it can not now be attacked to destroy jurisdiction, citing 44 Ohio State, 637, and 19 Ohio State, 296, and other cases involving fiduciary bonds; and *Schenck v. Cobb*, 8 North Eastern, 271, wherein the Supreme Court of Indiana held that a ditch bond with but one surety, although the statute required two, was not fatal to jurisdiction, having been approved by the county auditor, because of the provisions of a curative act which the court held to apply in such cases.

As to the first argument, the absurdity, in this particular case, of requiring sureties, is apparent, but no more so than if the Bank of England, or any other enormously rich private corporation or individual owning land in Van Wert county, should have been the petitioner; in which case surely, even for the minimum amount, a bond “with at least two sufficient sureties,” as required by Section 4451, would be indispensable.

Again, the word "bond," in Section 4483, does not require a different interpretation as used there from that applied to it in 4451, and it must not be overlooked that Section 4483 further provides that "in such case the commissioners shall count the municipal corporation as an individual petitioner." If it is to be so counted, then it must be so treated with respect to the bond, however absurd that may appear. As we have seen, the court's notions as to the absurdity of a statutory provision ought not to weigh against its plain meaning.

As to the second argument, it is sufficient to say that we have no such curative statute as, in Indiana, makes the decision of the court, in *Schenck v. Cobb*, possible, and that a clear distinction is to be drawn between bonds for the qualification of fiduciary officers and those required by statute to underlie the jurisdiction of inferior bodies attempting to exercise the powers of eminent domain. In the latter case, the filing of a proper bond is essential to jurisdiction. *Sessions v. Crunkilton*, 20 Ohio State, 349.

No want of diligence is chargeable to plaintiffs, for they began this action as soon as it was determined by defendants that their lands should be charged for location and construction, and we are therefore constrained, although reluctantly, in view of the costs made, to order decree with costs in favor of plaintiffs, avoiding the proceedings of the defendant commissioners upon the alleged petition of the city.

Blachley, Priddy & Kerns, for plaintiffs.

Harry Conn, Prosecuting Attorney, and *Horace G. Richie*, for defendants.

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Huebner-Toledo Breweries Co. v. Zevnik.

COVENANTS IN RESTRAINT OF TRADE.

[Common Pleas Court of Lorain County.]

HUEBNER-TOLEDO BREWERIES CO. v. ANNA ZEVRNIK.

Decided, January 22, 1906.

*Monopoly—Contracts in Partial Restraint of Trade not Enforceable,
When—Mutuality—Consideration—Covenants—Mortgage—Equity—
Injunction—Restriction of Use of Property to Sale of Beer of a
Certain Manufacture.*

1. If the contract is in partial restraint of trade, it can not be enforced unless it appears from the pleadings and the evidence to be founded upon a valuable consideration and to be reasonable and not oppressive.
2. Z borrowed money from the H T B Co., to be repaid in sixty-eight monthly installments, giving as security therefor a mortgage covering premises whereon she covenanted to erect a saloon and sell beer of the manufacture of the mortgagee for a period of ten years exclusively, this restriction to run with the land, and making unpaid Dow tax and accounts for beer furnished a lien on the premises. *Held:* That the contract is unreasonable and oppressive and lacking in mutuality, and injunction against the sale by Z of beer of other manufacture will not lie.

WASHBURN, J.

Motion to dissolve injunction.

The plaintiff in this case is a brewing company, and the defendant is a resident of Lorain, and the owner of a saloon at that place. The petition alleges that the plaintiff made the defendant a loan of \$1,700 to be paid in sixty-eight monthly installments of \$25 each, and to secure the same took a mortgage upon the defendant's premises in which the saloon is conducted at Lorain; that said mortgage contained the following covenant:

"And I, the said grantor, do for myself and my heirs, executors, administrators and assigns, covenant with the said grantee its successors and assigns, that for a period of ten (10) years

from and after the date hereof, the premises above described shall not be used for the sale of any beer, ale or porter whatsoever, except of the manufacture of 'The Huebner-Toledo Breweries Company,' its successors and assigns; and this covenant and agreement shall run with the land and be a limitation and restriction upon the use thereof for said period of time, without reference to the conditions on which said mortgage deed is made, and shall be held as a grant for the benefit of the said 'the Huebner-Toledo Breweries Company,' its successors and assigns, wholly independent of and in addition to the above conveyance of the premises by way of mortgage, and shall not be discharged by performance of any or all of the conditions and agreements, the performance of which are hereinafter stipulated as rendering the mortgage void."

Then the petition alleges that the defendant has violated said covenant, and is selling beer not manufactured by the plaintiff, and that she is not the owner of any property exempt from execution, and that plaintiff has no adequate remedy at law, and asks the aid of this court of equity to restrain the defendant from violating the above covenant.

A temporary injunction was granted without a hearing, and the defendant has filed a motion to vacate the injunction for the reasons that the allegations contained in the petition are untrue; and the case has been submitted to the court upon that motion. And while this is not a final hearing of the case, all the facts necessary to a final determination of the case were brought out at the hearing on the motion.

The defendant offered testimony to show that she was not insolvent, and also testified that she had never received the \$1,700 and that she did not knowingly enter into the contract. But I find from the testimony that there was no advantage taken of her in the execution of the contract, and that the plaintiff carried out its part of the contract so far as the money is concerned, by tendering the same to her, which she refused to take, giving as her reason at the time that she did not need it for a while. So that the case really turns upon whether or not a court of equity ought to enforce the covenant in question.

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The original mortgage was introduced in evidence and it contains some further provisions in reference to this covenant, which ought to be considered. There is a covenant obligating the defendant to keep the property insured in the sum of \$2,500, loss, if any, payable to the plaintiff, and then there is the following covenant:

"Whereas, said grantor, in consideration of the granting of said loan, especially agrees to conduct a saloon on said premises known as number — Tenth avenue, Lorain, Ohio, for the period of ten years and to buy and sell thereon, during said period of time, beer, ale and porter of the manufacture of said grantee, its successors and assigns, and more particularly the beer of its Findlay Branch, and no other beer, ale or porter whatsoever, and to pay for the same upon request of said company: and further agrees that any sum now or hereafter due to said grantee, for beer, ale, or porter delivered by it, for Dow tax, or money advanced by it, or for rent, or otherwise, shall be a lien upon said property and secured by this mortgage.

"And the said grantee hereby agrees to supply in its customary manner, good, wholesome and merchantable beer, ale and porter for and during said period of time, at a price mutually agreed upon and made a part hereof; provided, however, that in case said grantor shall fail to pay for same as aforesaid or in case said grantor shall fail to pay upon demand, any installment due to grantee for rent, or for money advanced by it for Dow tax or otherwise, then grantee's obligation to supply said beer, ale or porter, shall be void at its option; and in case of breach of this covenant or any part thereof, shall not be deemed a waiver as to any subsequent breach thereof. In case any additional tax or burden shall be imposed upon the sale or manufacture of beer, ale or porter, the price agreed upon as hereinbefore set forth, shall be increased by such added amount."

This is not an action at law; but the relief sought is specific performance of contract by enjoining the continued breach of a negative covenant in the contract.

It is clear that this contract could not be enforced by a court of equity against the plaintiff. The plaintiff "agrees to supply in its customary manner, good, wholesome and merchantable

beer, ale and porter for and during said period of time, at a price mutually agreed upon and made a part hereof." It is well settled that a court of equity could not compel the plaintiff to manufacture and deliver beer according to its agreement, as above set forth.

The case then resolves itself into the question of whether or not a court of equity should, in any case, where full performance can not be enforced, decree performance of negative averments of one party.

There is a great conflict in the authorities on this question. It was discussed quite fully, but not definitely decided, in *Steinau v. Gas Co.*, 48 Ohio St., 324. In that case there is a quotation from Pomeroy, Contracts, Section 163, as follows, page 332:

" 'The peculiarly distinctive feature of the equitable doctrine is, that the remedial right to a specific performance must be mutual. If, therefore, from the nature or from the contract itself, from the relations of the parties, from the personal incapacity of one of them, or from any other cause, the agreement devolves no obligation at all upon one of the parties, or if it can not be specifically enforced against him, then, and for that reason, he is not in general entitled to remedy of a specific performance against his adversary party, although otherwise there may be no obstacle arising, either from the terms of the contract or from his personal status and relation, to an enforcement of the relief against the latter individually.' Again, see Section 165, he says that 'it is a familiar doctrine that if the right to the specific performance of a contract exists at all, it must be mutual; the remedy must be alike attainable by both parties to the agreement.' "

The circuit court held in that case that:

"Where there is a clear and continuing breach of a negative covenant in a contract, and where an injunction against a breach of it will do substantial justice between the parties by obliging the defendant to carry out his contract or lose the benefit of the breach of it, and the remedy at law is not adequate, or the damages for such a breach are not susceptible of proper assessment by a jury, a court of equity may properly restrain the

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defendant from such a breach of the contract, though the court might not be able to enforce a complete specific performance of the contract against the other party." *Cincinnati Gaslight & C. Co. v. Steinau*, 2 C. C., 286.

And the Supreme Court, after quoting the above holding from the circuit court, say, page 333:

"However, after a somewhat careful examination of the numerous cases cited by counsel, and many others, we are inclined to the conclusion that the general doctrine laid down by Mr. Pomeroy is sustained by the apparent weight of authority."

I can not find that there has been any expression of the Supreme Court to the contrary, and I am inclined to the opinion that this court has no authority to enforce the contract in question against this defendant by injunction; but however that may be, there is another feature of the case that deserves consideration.

In *Lang v. Werk*, 2 Ohio St., 519, the Supreme Court lays down the law that:

"All contracts in general restraint of trade are opposed to public policy and void; and those in partial restraint are also illegal, except when founded upon a valuable consideration and when good reasons appear for entering into the contract."

And that before such a contract in partial restraint of trade can be enforced, it must appear from the pleadings and evidence, that the restraint is founded upon a valuable consideration, and that the contract is reasonable and not oppressive. It is also decided in that case that—

"A declaration which does not contain the necessary averments to show the contract reasonable, so as to rebut the presumption of law against its validity is bad on demurrer."

There must be not only the sufficient pecuniary consideration but a good reason for the contract. It is said in the above case that, page 529:

“ ‘A man can not, for money alone, where he has no other interest in the matter, purchase a valid contract in restraint of trade, however limited may be the circle of its operation.’ *
* * ‘Whatever may be the pecuniary consideration, it must appear in addition, that there was some good reason for entering into the contract, * * * but when a good reason appears for allowing the parties to contract, the restraint may extend far enough to afford a fair protection to the obligee.’ ”

If it goes further than that it is oppressive, and if oppressive, it is in the eye of the law unreasonable.

The loan made by the plaintiff in the case at bar, and the interest in the real estate which it acquired by the mortgage, may be considered a sufficiently good reason for entering into the contract.

Is the restraint contracted for any more than a fair protection to the plaintiff; is it reasonable and not oppressive?

The restriction is to “run with the land, and be a limitation and restriction upon the use thereof for such period of time without reference to the conditions on which said mortgage deed is made.”

It will be noticed that the mortgage is to be paid up in five and two-thirds years while the restraint is to continue for ten full years, no matter how soon the mortgage may be paid, and is not to be discharged by the performance of the ordinary conditions of the mortgage. After the mortgage is fully paid and satisfied, and the plaintiff has no interest in the property, is not a restraint continuing more than four years thereafter, rather more than is sufficient to afford the plaintiff a fair protection, in such a case as this?

Again, there is no agreement on the part of the plaintiff to furnish beer to the defendant, at any stipulated price or ascertainable price. The language of the agreement is: That plaintiff agrees to supply, in its customary manner, good, wholesome and merchantable beer, etc., for and during said period of time “at a price mutually agreed upon and made a part hereof.”

But there is nothing in the contract stating what that price is, and there is nothing in the evidence to show any mutual

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agreement as to price. If the plaintiff could exact an exorbitant price for its beer, and then because the defendant would not pay it, could prevent defendant from selling any other beer for the remainder of the ten years, would that not be considered as oppressive?

But if it be said that this contract is reasonable and is not oppressive, according to the meaning of those terms, as used in *Steinau v. Gas Co.*, *supra*, a court of equity would not decree performance of negative covenants of one party, where full performance can not be enforced, in any event, unless the court would find that such injunction would "do substantial justice between the parties."

Would the granting of the prayer of the petition in this case do substantial justice between the parties?

From a consideration of this whole agreement, it appears that the plaintiff on its part loans the defendant the money, and agrees to furnish beer, practically at its own price, and that in return therefor defendant agrees, and the contract carefully stipulates that she will repay the money with interest, and erect a saloon upon the premises; have it insured for the benefit of the plaintiff; run the saloon for ten years, and buy her beer from the plaintiff, and pay for the same upon request, and that on failure to pay promptly any sum due for beer or for Dow tax advanced by plaintiff, or for rent or otherwise, the same shall be a lien upon the property and secured by the mortgage. And it is also further provided, that if she fail to pay upon demand any installment due for rent, or for money advanced for Dow tax or otherwise, then the plaintiff's obligation to supply beer shall be void at its option. And it further provides that in case any additional tax or burden shall be imposed upon the sale or manufacture of beer, such increase shall be paid by the defendant.

It will further be noticed, that the defendant, when it is considered that she is bound to repay the money in monthly payments, pays the full legal rate of interest for the money loaned to her.

One of the reasons why a contract in restraint of trade is considered illegal and against public policy, is because it tends to the creation of a monopoly. One can not read the provisions of this contract, as above set forth, without arriving at the conclusion that the plaintiff thereby acquires a monopoly of the business of the defendant at the place named for ten years. Nor can one escape the conclusion that the defendant, by this contract, practically surrenders her property and business to the control of the plaintiff; nor that the contract is unreasonable and oppressive; nor that the enforcement of said contract, in the manner sought in this case, will not do substantial justice between the parties.

Such a contract in restraint of trade ought not to be enforced in a court of equity by the extraordinary remedy of injunction. The temporary injunction will therefore be dissolved.

W. L. Hughes, for plaintiff.

G. A. Resek, for defendant.

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DATE OF RELIEF FROM STOCKHOLDERS' DOUBLE LIABILITY.

[Common Pleas Court of Champaign County.]

THE SHEETS MANUFACTURING COMPANY V. THE NEER MANUFACTURING COMPANY ET AL.

Decided, April 28, 1906.

Ohio Corporations—Double Liability of Stockholders of—Terminated, When—Constitutional Amendment Self-Executing—Repeal by Implication—Old and New Sections 3258 and 3258a.

1. The amendment of Section 3 of Article XIII of the Constitution of the state, which went into effect November 23, 1903, repealed by implication the provision of Section 3258 as to double liability of stockholders, which was in force at that time.
2. Moreover, the provision of this amendment, that "in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her," does not merely indicate a line of policy without supplying the means by which such policy is to be carried into effect, but is absolutely prohibitory in its character and became self-executing.
3. It follows, therefore, that stockholders in Ohio corporations are relieved from double liability for debts incurred by such corporations, not only from and after the legislative enactment of April 25, 1904, but from the going into effect of the constitutional amendment on November 23, 1903.

MIDDLETON, J.

This action is brought by the plaintiff against the Neer Manufacturing Company and the stockholders of said company to enforce the stockholders' statutory liability. Among these stockholders are John M. Niles and Amanda J. Niles.

The action is brought upon an account in the sum of \$198.99, a copy of the account is annexed to the petition marked "Exhibit A" and made a part thereof. The only item of debit in said account is dated March 17, 1904—"To lumber, \$401.75." There are two credits in the account, one of May 27, 1904, \$200; one of August 30, 1904, \$2.76, making a total credit of \$202.76, and leaving a balance due upon said account of \$198.99,

the amount sued upon. The petition contains the usual averments necessary to show the liability of the several defendant stockholders, but there is no averment in the petition that any one of the defendant stockholders is indebted to the defendant company for unpaid stock owned by him or her.

The defendants, John M. Niles and Amanda J. Niles, each demur to the petition for the reason that the same does not state facts sufficient to constitute a cause of action against them.

The indebtedness in favor of the plaintiff, the Sheets Manufacturing Company, as shown by the account made a part of the petition, was contracted March 17, 1904, and in support of the demurrer filed by these two defendants it is urged that upon this date, March 17, 1904, there was no double liability attaching to stockholders of a corporation under the Constitution and statutes of the state of Ohio, and as the petition contains no averment that either of these defendants were indebted to the defendant company for unpaid stock subscription owned by them, that no cause of action is stated in the petition against either, and, therefore, the demurrer should be sustained.

The question thus raised leads to a consideration of the liability of stockholders of a corporation under the old Constitution of 1851, Section 3, Article XIII, and the statute enacted to enforce such constitutional provisions, Sections 3258 and 3258a of the Revised Statutes as amended and enacted April 29, 1902, and the effect upon the provisions of the Constitution of 1851 and the statute passed to carry the same into effect by the amendment of Section 3, Article XIII, adopted November 3, 1903, and which became a part of the Constitution November 23, 1903, and the act of the Legislature of Ohio, passed April 25, 1904, amending Sections 3258 and 3258a of the Revised Statutes of Ohio, for the purpose of carrying into effect the constitutional amendment of November 23, 1903; also an act of the General Assembly of Ohio, passed April 29, 1902.

The indebtedness in favor of the Sheets Manufacturing Company, the plaintiff, upon which the suit is commenced, was contracted March 17, 1904, between the time when the amendment to the Constitution adopted November 3, 1903, became a part

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of the Constitution, to-wit, November 23, 1903, and the enactment of the statute carrying into effect this amendment to the Constitution passed by the Legislature April 25, 1904; and it is contended by counsel for the plaintiff that this being so the provisions of the old statute remained in effect until the passage of the act of April 25, 1904, and hence double liability attached to the defendant stockholders at the time this indebtedness was contracted, March 17, 1904.

The only question argued by counsel by briefs submitted in support of or against the demurrers is whether or not the amendment to the Constitution, which went into effect November 23, 1903, is or is not self-executing. If self-executing, no double liability, it is claimed, could attach to these stockholders at the time the debt was contracted; but there are other questions, in the opinion of the court, involved in a full consideration and determination of the questions raised by the demurrers, and these the court has thought necessary to consider in arriving at a conclusion.

The provisions of the Constitution of 1851 are as follows:

Section 3, Article XIII. Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law; but in all cases each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock."

Prior to the amendment of April 29, 1902, repealing the same, Section 3258 of the Revised Statutes provided as follows:

"The stockholders of a corporation which may hereafter be formed and such stockholders as are now liable under former statutes shall be deemed and held liable in addition to their stock in an amount equal to the stock by them subscribed, or otherwise acquired, to the creditors of the corporation to secure the payment of the debts and liabilities of the corporation."

On April 29, 1902, the Legislature passed an act amending and repealing Section 3258, found in Ohio Laws, Vol. 95, page 312, which act provides as follows:

"The stockholders of a corporation who are the holders of its shares at a time when its debts and liabilities are enforceable

against them, shall be deemed and held liable, equally and ratably, and not one for another, in addition to their stock, in an amount equal to the stock by them so held, to the creditors of the corporation, to secure the payment of such debts and liabilities; and no stockholder who shall transfer his stock in good faith, and such transfer is made on the books of the company, or on the back of the certificate of stock properly witnessed or tendered for transfer on the books of the company prior to the time when such debts and liabilities are so enforceable, shall be held to pay any portion thereof."

On November 3, 1903, by a vote of the electors, Section 3, Article XIII of the Constitution was amended, which amendment provides as follows:

"Section 3. Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her."

This amendment became a part of the Constitution November 23, 1903.

On April 25, 1904, the Legislature passed an act repealing Sections 3258 and 3258a, which provides as follows:

"Section 3258. The stockholders of a corporation who are holders of its shares at a time when its debts and liabilities are enforceable against them, shall be deemed and held liable, equally and ratably, and not one for another, in addition to their stock, in an amount equal to the stock by them so held, to the creditors of the corporation, to secure the payment of such debts and liabilities, and no stockholder who shall transfer his stock in good faith, and such transfer is made on the books of the company, or on the back of the certificate of stock properly witnessed or tendered for transfer on the books of the company prior to the time when such debts and liabilities are enforceable, shall be held to pay any portion thereof. Provided, however, that the above provision of this section shall not apply to stockholders in any corporation created after the 23d day of November, 1903, nor shall it apply to any debts or liabilities of any corporation incurred after said date; and as to all debts and liabilities of corporations for profit incurred after said date, the stockholders of such corporations shall be under no liabilities other than thus stated in Article XIII, Section 3 of the Constitution of Ohio."

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This act of April 25, 1904, is intended to carry into effect the amendment to Section 3, Article XIII of the Constitution, which became a part of the Constitution November 23, 1903, and to preserve to creditors of corporations their right to hold stockholders liable for debts and liabilities incurred prior to the amendment; and by express provisions relieves stockholders of any corporation created after November 23, 1903, from double liability and also from double liability for any debts or liabilities incurred after said date.

The debt upon which this action is brought was incurred by the corporation after November 23, 1903, to-wit, March 17, 1904. If, therefore, this act of April 25, 1904, is a valid constitutional enactment no double liability attached to the defendant stockholders on account of the debt, and the demurrers should be sustained.

Is this act in violation of the constitutional provisions in effect at the time of its passage? Counsel have cited a decision of the Circuit Court of the Seventh District (Mahoning county) rendered at its March Term, 1905, the case of *Swift & Company v. Youngstown Baking Company et al*, 6 C. C.—N. S., 89, in which the court held (two judges concurring and one dissenting) the act of April 29, 1902, in violation of Section 3, Article XIII of the Constitution and wholly inoperative, and in which the court say in concluding the reported opinion, "The same holding should be made as to the act of April 25, 1904 (97 O. L., 390)."

I have been unable to see how the validity of this act was drawn into the consideration of that case or any reasoning of the court leading to this conclusion. The liabilities upon which the action was brought in that case were all incurred between January 1, 1903, and May 2, 1903, and prior to the amendment which became a part of the Constitution November 23, 1903.

In that case the circuit court had under consideration the validity of the act of April 29, 1902, under the Constitution as it was when the act was passed, and basing its opinion on the decision of the Supreme Court, *Brown v. Hitchcock*, 36 O. S., 667, 678, and *Harpold v. Stobart*, 46 O. S., 397, held the act void.

In passing upon the case the court says:

"It is conceded that the Supreme Court has distinctly decided in two cases under the statutes that preceded the act of April 29, 1902, that the stockholders became liable at least as guarantor or surety from the date the debt was contracted, and any subsequent sale and transfer of his stock, although *bona fide* made, did not release him. The majority of the court is of the opinion that these cases distinctly decide that by the provision of Section 3, Article XIII, by its terms independent of the statute, the liability of the stockholders attaches at the time the liability is incurred by the corporation, and that that is the settled law of this state under the Constitution as construed by the Supreme Court, and, therefore, the act of April 29, 1902, is in violation of the Constitution of the state."

Now let us consider the provisions of the Constitution in force with reference to the liability of stockholders when the cases of *Brown v. Hitchcock* and *Harpold v. Stobart* were decided by the Supreme Court, and when the above case was decided by the circuit court. The constitutional provision was:

"Dues from corporations shall be secured by such individual liability of stockholders and other means as may be prescribed by law; but in all cases each stockholder shall be liable, over and above the stock by him or her owned and any amount unpaid thereon, to a further sum at least equal in amount to such stock."

In the case of *Brown v. Hitchcock*, Judge White, in announcing the opinion of the court, says:

"The Constitution in providing for the creation of corporations by the General Assembly prescribed as a condition to their creation that the creditors of such corporations, in addition to the liability of the corporation, shall be secured by the individual liability of the stockholders. The constitutional provision is as follows."

Then follows a statement of the constitutional provisions as above quoted.

The act of April 29, 1902, provided that only stockholders of a corporation, who were the holders of its shares at a time when its debts and liabilities were enforceable against them, should be deemed and held liable, etc., and further provided

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that no stockholder who shall transfer his stock in good faith, etc., prior to the time when such debts and liabilities are so enforceable shall be held to pay any portion thereof.

This act, changing the liability of the stockholders of a corporation from the liability imposed upon them by the Constitution as construed by the Supreme Court in the two cases referred to, the circuit court held to be wholly inoperative and void.

But what were the provisions of the Constitution relative to securing dues from corporations and the individual liability of stockholders when the act of April 25, 1904, was passed? No one will question but that the Constitution with respect to these subjects had undergone a change, a very material one; that the amendment to Section 3, Article XIII, of that instrument adopted by a vote of the people November 3, 1903, became a part of the Constitution November 23, 1903.

This amendment is as follows:

"Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholders be individually liable otherwise than for unpaid stock owned by him or her."

This was the constitutional provision relating to dues from private corporations under which the act of April 25, 1904, was passed.

Is such act then constitutional? It is well settled that a statute should not be declared unconstitutional unless it is clearly and unreconcilably so. If a doubt exists as to the constitutionality of a statute the benefit of the doubt is to be given to the law. It first secures to the creditors of a corporation their right to enforce double liability against stockholders, as such right existed up to the time of the amendment, on all debts and liabilities contracted prior to that time, and releases stockholders from double liability for any debts or obligations incurred by the corporation subsequent to the amendment. I am unable to see, therefore, how this law in any manner violates the provisions of the Constitution, Section 3, Article XIII, as they stood at the time of its enactment.

It might be claimed that the retroactive feature of this act, applying as it does to all debts and obligations incurred after

November 23, 1903, renders it void as impairing the obligation of contract, but this contention I am of the opinion would not be well founded.

It is true the relation between the creditors of a corporation and the stockholders concerning their individual liability for the debts of the corporation is held to be in the nature of a contract (*Brown v. Hitchcock*, 36 O. S., 667, and cases cited thereunder); but such relation there cited results from constitutional and statutory provisions imposing individual liability upon stockholders and it follows, therefore, if there are no constitutional and statutory provisions imposing such individual liability at the time the debt is contracted, no such relation arises between the creditor and stockholder.

In the case of *Brown v. Hitchcock*, above cited, White, Judge, says:

"Our Constitution and laws make it an essential condition to persons availing themselves of the instrumentality of a corporation for the transaction of business that the security of their personal liability shall attach to and attend all corporate liabilities."

After the amendment of Section 3, Article XIII, became a part of the Constitution November 23, 1903, there was no double liability attaching to stockholders of a corporation by virtue of any constitutional provision, and in the opinion of the court no statutory law in force providing such liability, and here we have, in the opinion of the court, an instance in which the amendment to the Constitution of November 23d in a way enforces itself. In the opinion of the court Section 3258 of the Revised Statutes was inconsistent with the amendment to the Constitution of November 23d and by implication was repealed by it when it took effect; at least so much of said section as provided double liability of stockholders was repealed.

Repeals by implication are not favored, and still it is well settled that where the repugnancy between the provisions of two statutes is clear and so contrary to each other that they can not be reconciled, the later will operate as a repeal of the former and the same rule applies when the repugnancy exists between a constitutional provision and a legislative enactment.

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Judge Ranney in *Ohio, ex rel. v. Dudley*, 1 O. S., p. 441, stating the rule as above, says:

"This rule is the result of a long course of decisions and we know of no reason why it does not equally apply when the repugnancy is alleged to exist between a constitutional provision and a legislative enactment."

The same doctrine is announced in *Cass v. Dillon*, 2 O. S., 607; *The State, ex rel. v. The Trustees of Union Tp.*, 8 O. S., 394; *Com. of Knox Co. v. Nicholas*, 4 O. S., 260.

In these cases no such repugnancy between the constitutional provisions and the legislative enactment was found to exist as would warrant the holding that the former repealed the latter by implication, but the rule is clearly stated that had such repugnancy existed, the rule of repeal by implication would apply.

A decision directly in point in this case in the opinion of the court is found in the case of *The State, ex rel. v. The Governor of Ohio*, 5 O. S., p. 528 (discussion by the court on pages 539 and 540).

In passing the act of April 25, 1904, the Legislature seems to have taken a different view of the effect of the amendment on Sections 3258 and 3258a, Revised Statutes, because by the act it expressly repeals these sections; but this is of little consequence, if as this court thinks there was such repugnancy between the amendment and the statute that both could not stand. The statutes, Section 3258 and 3258a, at the time of the amendment provided that:

"The stockholders of a corporation who are the holders of its shares at the time when its debts and liabilities are enforceable shall be deemed and held liable in addition to their stock by them held to the creditors of the corporation to secure the payment of such debts and liabilities."

The amendment to the Constitution of November 23, 1903, provides:

"In no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her."

It, therefore, seems to the court that these provisions, at least as far as they relate to double liability of stockholders,

are so repugnant and contrary to each other that they can not be reconciled and that the statute ceased to operate when the amendment took effect.

A case bearing a very close analogy to this case is found in the 69 N. C., Rep., at page 419, the case of *The State v. King*.

The indictment against the defendant King was found at the fall term, 1872, and charged that on the first day of May, 1863, the defendant burned a grist mill willfully and feloniously against the form of the statute. The judge quashed this bill and the state appealed. At the time this offense was alleged to have been committed in 1863 the law punished the offense with death (Section 2, Chapter 34 of the Revised Code of that state). In 1868 the Constitution of the state, Article XI thereof, was enacted as follows:

"Section 1. The following punishment only shall be known to the laws of this state, viz: death, imprisonment with or without hard labor, fines, removal from office, etc.

"Section 2. Murder, arson, burglary and rape, and these only may be punished with death if the General Assembly shall so enact."

On the 10th day of April, 1869, the next year after the enactment of the constitutional provision just referred to, the General Assembly passed an act as follows:

"Every person convicted of any crime whereof the punishment hitherto has been death by the laws of North Carolina, existing at the time the present Constitution went into effect, other than the crimes before specified (among which crimes specified in the act was not included the one charged, to-wit, willfully and feloniously burning a grist mill), shall suffer imprisonment in the state's prison for not less than five nor more than sixty years."

Counsel for the defendant in this case contended that he could not be punished by the Revised Code for that had been repealed by the Constitution or by that in connection with the act of 1869; nor by that act because it was not retrospective; nor by the common law because by that the offense was only a misdemeanor, and the prosecution of a misdemeanor was barred after two years.

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In passing upon this case the court says:

"We think the counsel takes a mistaken view of the intent and effect of the Constitution. The effect of his interpretation of Sections 1 and 2 of Article XI would be that immediately upon the adoption of the Constitution all offenses which were punishable otherwise than by fines and imprisonment (including murder, arson, burglary and rape), would cease to be punishable by the Legislature. We say, including murder, etc., for it was evidently the intention of Section 2 that these offenses should cease to be punishable with death, unless the Legislature should so enact. It is true that counsel does not push his proposition quite so far; he admits that the common law punishment would be imposed provided the offense was not out of date. But it can not have been the intention of the Constitution to restore, for the interval which must have been forseen between its adoption and the action of the Legislature, the common law punishment, for among these were whipping and the pillory, the very punishments which it was most anxious to prohibit."

And then the court adds further along in the opinion—

"The Constitution does not repeal Section 2 of Chapter 34 of the Revised Code; it repeals only so much of it as imposes death as a punishment for this offense."

It will seem that the court in this case held that the constitutional enactment of 1868 repealed, upon its going into effect, that portion of the statute or of the Revised Code of the state, which made the offense of willfully and feloniously burning a structure, such as was described in the statute, punishable by death; and it will be noticed further that in this case the court, without holding that all the provisions of this statute was repealed by the constitutional enactment, held that the prohibitory matter contained in the constitutional provision, and which was inconsistent and irreconcilable with the statute, repealed the statute to that extent.

By a parity of reasoning I can see no reason why the amendment amending Section 3, Article XIII of the Constitution of the state, of November 23, 1903, which is absolutely prohibitory in its character, should not be held to have repealed, by implication at least, the provisions of Section 3258 of the Revised Statutes in force at the time of the adoption of this amendment, providing for double liability.

And now as to the question of whether or not this amendment to the Constitution, independent of the question of repeal by implication, is or is not self-executing.

It is no doubt true that often new constitutional provisions are treated as inoperative until rendered effective by subsequent legislation, and in such cases those whose rights are affected by such provisions remain as before their adoption until the enactment of a statute rendering them effective. And that such provisions will be held to be inoperative in cases where the object sought to be accomplished by them is made to depend in whole or in part upon subsequent legislation. And it seems to be well settled by the weight of authorities that constitutional provisions designed to secure dues and demands against corporations by imposing liability therefor upon the stockholders thereof in addition to the stock held by each and by such other means as provided by law, are not self-executing. And that if constitutional provisions merely enact a line of policy or principles without supplying the means by which such policies or principles are to be carried into effect, they are not self-executing and will remain inoperative until rendered effective by subsequent legislation.

The authorities in support of this proposition are abundant and are cited in the brief of counsel for the plaintiff in this case. But it will be seen at a glance by a mere reading of the amendment to the Constitution of November 23, 1903, that this amendment was not designed alone to secure dues and demands against corporations by such means as may be provided by law, but it contains the further provision: "In no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her."

I can not understand how this provision of the Constitution could be made more effective by subsequent legislation. I can not understand why this provision is made to depend in whole or in part upon any subsequent legislation. It is not a constitutional provision, in the opinion of this court, merely indicating a line of policy or principle without supplying the means by which such policy and principles are to be carried into effect. It is, as I have said, absolutely prohibitory in its charac-

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ter and could not as I can conceive be made more effective by subsequent legislation than it is made by the constitutional provision itself.

In a leading and well considered case found in the 87 Illinois Rep., page 385, the case of *Ida Irene Law et al v. The People, ex rel Louis C. Huck, Collector, etc.*, the court, in construing a constitutional provision of the Constitution of the state of Illinois, say:

“The constitutional provision supposed to be violated by the issuing of these certificates for temporary loans, is the first clause of the twelfth section of Article IX and is this: No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five percentum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness.

“The language of this clause is clear, explicit and emphatic, that no city shall be allowed to become indebted in any manner or for any purpose beyond the prescribed limit. The city of Chicago was indebted beyond the limit when these certificates were issued, and if they, in any manner or for any purpose, create an additional indebtedness beyond that limit, they are clearly prohibited. The language prescribing the limit is so plain as to admit of no doubt, and forbids all construction and the provision must be enforced as it is written. When the intention of the framers of the Constitution is ascertained, it must, as all will concede, be held paramount to all other powers in the state. It embodies the sovereign power of the state. It is the source to which all the departments of government, and all of its officers must ultimately look, to authorize and sanction their official acts. It is the command of the supreme power of the state and it must be obeyed. Nor is there lodged, in our form of government, in any department or functionary, any authority to dispense with this or other provisions of the fundamental law, or to mitigate its requirements.

“It has also been repeatedly held, and is regarded as settled doctrine, that all negative or prohibitory clauses of this character found in a Constitution execute themselves as legislative provisions, in the same or other language, prohibiting the incurring of such indebtedness, could be no more binding or forcible than the Constitution itself.”

Gregg, Adm'r, v. Hammond et al.

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It seems to this court, therefore, that to hold that this provision of the amendment to our Constitution of November 23, 1903, was not self-executing and that such provision needed legislative enactment to give it force, would be in effect to hold that the Legislature of Ohio was clothed with authority to enforce or not to enforce this prohibitory provision of the Constitution by subsequent legislation as it might deem best, and that if the Legislature should fail or refuse, for any reason, to enact a law to carry into force and effect this prohibitory provision of the Constitution, that, notwithstanding its clear, explicit and emphatic declaration, that in no case shall any stockholder of a corporation be held individually liable otherwise than for the unpaid stock owned by him or her, that the statute (Section 3258) imposing double liability would continue for all time to be and remain in force.

I can not conceive such to have been the intention and meaning of the framers of this amendment to our Constitution.

It follows that the demurrers of the defendants, John M. Niles and Amanda J. Niles, to the petition of the plaintiff in this case should be sustained and the action of plaintiff dismissed.

Buroker & Zimmer, Waite & Deaton, T. J. Frank and L. D. Johnson, for the plaintiffs.

Banta & Banta, for the demurrer.

TAXATION OF FUNDS IN HANDS OF AN ADMINISTRATOR.

[Common Pleas Court of Pike County.]

JOHN W. GREGG, ADMINISTRATOR, v. PHILIP HAMMOND ET AL.*

Decided, January, 1900.

Taxation—Section 2734 Construed—Decedent's Estates—Funds from Sale of Mortgaged Premises—Must be Listed by Administrator.

Funds derived by an administrator from the sale of mortgaged premises, and deposited by him in bank preparatory to payment to the mortgagees, should be listed by the administrator for taxation, notwithstanding the entire amount will be required to satisfy the liens which have been established and ordered paid.

*Affirmed by the circuit court May 23, 1900, without report.

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COLLINGS, J.

There is no serious dispute between the parties as to the facts of the case. It appears that the plaintiff, administrator, had sold certain real estate of the intestate for the purpose of paying debts, which sale was confirmed April 2, 1895, and on that day about \$30,000 of proceeds were ordered paid to the mortgagees of the intestate who were ascertained to have valid liens upon the premises. The money was not in fact paid over under the order of distribution but remained in bank to the credit of the administrator. The assessor returned the money as belonging to the mortgagees and subject to taxation as theirs. The auditor seeks to list it as taxable in the hands of the administrator and this proceeding is to enjoin the auditor from such listing. The exact question presented for decision, as I understand it, is: Were these moneys so held by the administrator assets of James Emmett's estate, and as such subject to taxation in the hands of the administrator?

The statutes provides, Revised Statutes, 2734, that "moneys deposited subject to his order, check, or draft" shall be listed for taxation; that belonging to the "estate of a deceased person, by his executor or administrator."

The money arising from the sale in this case was deposited in the bank and was there subject to check of the administrator, so that it comes literally under the designation of the statute, but it is contended that it was not in fact assets of the estate, because it was in fact the proceeds of property, the title to which was in the mortgagees, and the fund is simply substituted for the property.

After a good deal of consideration I am not able to assent to this reasoning. It is true that an order of distribution had been made, and the administrator required to pay this amount of money to the owners of the mortgage. It does not appear to me that he was necessarily bound to pay it out of this particular fund, although in this instance it is probably all the fund from which they had to pay it, but it was not designated any way in bank as differing in any way from other funds which they might have had in their hands. It was, as I think, assets of the estate and the administrator could check upon it for the pur-

pose of carrying out the order of distribution to the mortgagees, and so far as I can see, he could not have checked from any other fund which he might have had belonging to the estate.

It seems to me that *McNeill v. Hagerty*, 51 Ohio St., 255, 265, virtually decides that this fund is taxable. In that case the Supreme Court draws a distinction between the case of an assignee and that of an administrator, holding that the former need not list simply because he is not required to by the terms of the statute, but at the same time points out that an administrator is required to list, and then says that "As to administrators, it is true that property in their hands is subject to the payment of the debts of the decedent, and that creditors are expected to list their claims as credits, and often it happens that the debts consume the entire assets. But usually there is in fact, as well as in contemplation, a residue going to widows and legatees or heirs, and they are not required to list for taxation any amount until it is actually received."

The effect of the whole case, as I understand it, is that if an assignee were included in the category of administrators and the other trustees enumerated in the statute, he would have to list, hence it follows that the administrator, being named, must list.

The case of *Stone v. Strong*, 42 Ohio St., 53, does not seem to hold any contrary doctrine. The judgment and finding must be for the defendant.

J. A. Eylan, for plaintiff.

F. E. Dougherty, for defendant.

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City of Cincinnati v. L. & N. Railroad Co.

POWER OF COUNCIL TO AUTHORIZE EXCLUSIVE OCCUPATION OF STREETS.

[Superior Court of Cincinnati, General Term.]

THE CITY OF CINCINNATI V. THE LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Decided, June 16, 1906.

Municipal Corporations—Overhead Railway Structures in Streets—No Power in Council to Authorize, When—Could Not be Conferred by an Obscure Amendment to a Penal Statute—Statutes Relating to Bridge Companies and Grade Crossings Not Applicable—Application of the Maxim, "Expressio Unius Est Exclusio Alterius"—Sections 3283, 2640, 6921, 1536-100, 1536-102 and 3337-1 as Amended.

1. There is an entire absence of power in council, under the statutes as they exist today, to authorize the erection of any structure, abutment or support in a public way, which will necessarily prevent a joint use by the public of the part so occupied.
2. Section 3337-1 is a statute penal in its nature, and the maxim *expressio unius est exclusio alterius* can not be invoked in order to derive therefrom power vesting in the municipal corporation the right to grant to railroads the exclusive use of the public streets.
3. But even if the power were lodged by the statutes in council to grant some use of the city streets to railroads for placing piers, posts or supports therein, the power could not be abused by council, and if it is abused in such a way as to interfere with the ordinary rights of the public in and to the ordinary use of such streets, a court of equity will interpose by injunction.

HOFFHEIMER, J.

This was an action brought by the City of Cincinnati, through its solicitor, under and by virtue of Section 1777, Revised Statutes, whereby it is made the duty of the solicitor to apply, in the name of the corporation, for an order of injunction to prevent the abuse of corporate powers of the city, or the execution or performance of a contract made in behalf of the corporation which is in contravention of law.

The petition, or rather, amended petition, is very lengthy, and it is not necessary to set out the claims made therein, as it will fully appear in the course of the opinion herein just what it is that city asks that the L. & N. Railroad Company be enjoined against.

Upon application by the city, a temporary restraining order was allowed, and the hearing now is upon defendant's motion to dissolve the same. The cause is one of no little importance to both parties—important to the railroad company, because the contract for the construction of the viaduct, the erection of which is now enjoined, has been let by it, and the steel necessary has all been ordered and shipped. This contract alone involves an expenditure of \$175,000; \$400,000 has been expended by defendant railroad company for right of way over private property; \$562,000 have been devoted to securing property for terminal facilities, and a bridge across the Ohio river has been purchased by the railroad company. The structure now involved is the connecting link between said bridge and the approach to the proposed terminals in the city. The case is also one of extreme importance to the public, because it involves the rights of the public in and to the public grounds and streets which this proposed structure, if completed, must necessarily touch upon. The hearing involves a consideration of the legal effect of two ordinances of the city council which purport to authorize the defendant railway company to construct a viaduct or overhead structure for railroad purposes across what is known as the public landing and streets of the City of Cincinnati.

The contention of the city may be summed up thus:

“1. That council has no power to authorize the erection of any structure or abutments in the public ways which necessarily prevent a joint use by the public of the part so occupied.

“2. That if council has power to authorize some occupation of the public way or streets by any such structure or abutments, that council has no power to authorize structures or abutments of a size, character, number and height which would, in fact, impede, interfere with and obstruct public travel.”

The history of the case reveals that, on November 7, 1904, the council of the City of Cincinnati passed an ordinance No. 643, “Agreeing upon the manner, terms and conditions upon which the L. & N. Railroad Company may use, occupy and cross over, along and upon the streets, alleys and public grounds of the City of Cincinnati, for the purposes of constructing and maintaining and operating an extension of its steam railroad from a point at or near pier No. 1, on the north side of the Newport & Cin-

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cincinnati Bridge, in the City of Cincinnati, to the site of the proposed depot south of Water street, between Vine and Plum streets in said city."

To this ordinance a plat was attached showing the exact location of the viaduct, which plat was made a part of the ordinance. This ordinance was duly accepted by the railroad company. On August 28, 1905, council passed an ordinance amending Section 1 of this ordinance, setting out specifically the exact character, location and height of the viaduct in all places where it touched upon public streets or grounds. Section 2 of the original ordinance contained a provision to the effect that the elevated structure "shall be of such height and character as not to interfere with the ordinary travel over such street, alley or public ground." The second, or amended, ordinance, passed August 28, 1905, amended Section 1 of the original ordinance, prescribing, as I have already stated, minutely and specifically the exact character, location and height of the viaduct wherever it appeared the same touched on public streets or ground. It provided that on the public landing there should be no longitudinal bracing, and that the minimum vertical clearance should be twelve feet; that the bents should have vertical posts nine feet apart transversely from center to center; that the general length of the span should be twenty-five feet from center to center of bents, but that upon the curved portion at the east there should be six spans a half foot shorter, and upon the curved portion to the west there should be two spans six inches shorter. The evidence shows, in addition, that a concrete wheel guard three feet in diameter is also to be placed at the base of each bent, thus reducing the width of the span, on the ground surface, to twenty-two and one-half feet, and that eighteen inches above the ground and clear of the concrete wheel guard the maximum width between bents would be twenty-three and one-half feet. The evidence further shows that, by these plans, the vertical clearance will attain the minimum prescribed at the extreme east and west, and that the spans other than those at the extreme east and west of the landing will have a greater vertical clearance, the maximum being about the center of the public landing, where the clearance will be thirteen feet and ten inches, and that twenty-seven spans will have a vertical clearance of more than thirteen feet.

From this description one may have a general understanding of the nature of the structure that the railroad proposes to erect along the public landing and at the end of Broadway, Sycamore and Walnut streets, if such streets were extended.

If we were to concede that the council had the power to grant a railroad company the right to place such bents or stays or supports for its proposed structure on the public landing or at the head of the streets named in the petition, if extended to the river, it would be an abuse of power, nevertheless, if, in granting such right the effect would be to cut off or materially interfere with the ordinary public travel or the public's free and uninterrupted use of such part of its streets or highways.

By virtue of Section 2640, Revised Statutes, council is required to keep the streets open and in repair and free from nuisance. Obviously it can not denude itself of such power and grant a railroad company the right to build a structure according to particular plans or specifications, where it clearly appears such structure would, in its very nature, be an exclusive use, or would be a menace, hindrance or detriment to the dominant right of the public in the use of its streets or public grounds. The question, then, would be, if council had any power to permit the use of the public streets or public landing as proposed, does the evidence show that the structure as proposed is of such character as will materially interfere with the ordinary public travel or use of such streets?

Several days were given over to hearing testimony on this point. Citizens, members of the Chamber of Commerce, were heard, as were also a great number of boss teamsters and drivers—men who are and have been accustomed to hauling on the public landing. And there was also quite an array of civil engineers. The proposed location of this viaduct, the evidence shows, is on the crest, or apron, of the public landing. That is to say, it is to be located at or about the point, for the most part, where the substantial grade begins. In going up and down the public landing, as a general thing, teams are made to go obliquely, because of the grade of the landing. Thus we have presented for consideration the practicability of teams, say of two, four, six or more horses, drawing heavy loads, wagons and loads of varying height and breadth, being able to clear the

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structure under all conditions, including those of ice and sleet. Then there is another method of pulling what may be said to be a dead weight, straight up the hill; that is to say, not going on a slant, or obliquely, with teams varying in number and with wagons and loads of different sizes and height. And again we are met with a consideration of the practicability of the ordinary driver of such teams being able to hit the bull's eye, as it were, and being able to pass under and through the clearance in safety.

The opinions of several engineers, who undertake to show, by mathematical demonstrations, that it would be both feasible and practicable for drivers in charge of teams attached to heavily laden wagons to drive through the clearances; and the opinions of the ordinary merchant, or business man, with little or no practical experience in driving teams or horses on the public landing, is of little, if any, value when placed alongside of the opinions of boss teamsters and the experienced drivers, men who for years have been daily engaged in the work of either superintending or actually driving teams, with great loads, up and down the public places in question. The latter are the men best qualified to speak, and no one could hear the testimony of these men and not be convinced, and I so find the facts to be, that the structure, as it is proposed to be built in accordance with the amended ordinance of council, would not only seriously interfere with the public's use of these streets and grounds, but, under some conditions, as one witness put it, might be dangerous.

If, then, council had the power to grant the railroad the right to use the public streets by giving it the right or permission to erect stays or supports therein, surely a court of equity would prevent the council—"the trustees of the public"—from abusing the power, or exercising the power in such a manner as to materially interfere with the public in its use and enjoyment of such streets and public grounds. If there were no other reason for continuing the injunction heretofore granted because of this abuse of power alone, it would be the duty of this court to interfere. For the authorization of such a use by the railroad company would be the outgrowth of an unlawful use or exercise of power on behalf of council, even if we were to assume that it had the power to permit some sort of stay or support in the public

ground. For such an abuse the courts have ample power to intervene. See *Gas Company v. Elyria*, 57 O. S., 374.

But there is a more cogent reason for enjoining this work. Council was utterly without any power to grant the defendant railroad an exclusive use of the public streets for the purpose of erecting its structures, stays or supports. Whatever power council has must have been expressly granted by the Legislature representing the sovereign power of the state. We must, therefore, look to the statutes.

Section 3283 of the Revised Statutes is as follows:

"If it be necessary, in the location of any part of a railroad, to occupy any public road, street, alley, way or ground of any kind, or any part thereof, the municipal or other corporation, or public officers or authorities, owning or having charge thereof, and the company, may agree upon the manner, terms and conditions upon which the same may be used or occupied."

Our Supreme Court has had occasion to interpret this section, and, in *Railway Company v. Elyria*, 69 O. S., 414, it was held:

"Syllabus 3. Where a railroad company, for the purpose of supporting its overhead crossing of a public city or village street, erects and maintains abutments which occupy a portion of a street, excluding the public therefrom, and claims the right to do so under contract made with the municipal council, it must appear that the council was authorized by statute, in express terms, or by clear implication therefrom, to make such contract; a mere general legislation authorizing the railroad company to occupy a street for the purposes of its road, is insufficient for such permanent and exclusive use." *Ravenna v. Pennsylvania Company*, 45 O. S., 118, approved and followed.

"Syllabus 4. Section 3283, Revised Statutes, does not authorize a city or village council to agree with a railroad company for the permanent and exclusive occupation of a public street with abutments to support an overhead crossing of the railroad, nor can such occupation be rightly gained by means of appropriation. And if the company so occupying the street refuses to restore it to its former condition of usefulness to the public, it may be compelled to do so by mandatory injunction, without a right to compensation for the expense of removal."

The *exclusive* use to which the court was here referring unquestionably had reference to such portions of the public street

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as were occupied by the piers or abutments of the railroad. It was the right of the public in and to such portions of the street so exclusively taken up by the railroad, to which the Supreme Court was addressing itself. Prior to the decision in the Elyria case, in *Railroad Company v. Defiance*, 52 O. S., 262, in considering rights alleged to have been granted to the railroad company under and by virtue of Section 3283, Revised Statutes, our Supreme Court had occasion to say :

“The powers conferred on municipal corporations with respect to the opening, improving and repairing of their streets and public ways, *are held in trust for public purposes*, and are continuing in their nature, to be exercised from time to time as the public interests may require; and they can not be granted away or relinquished or their exercise suspended or abridged except when and to the extent legislative authority is expressly given to do so; such authority is not given by Section 3283 of the Revised Statutes. Every grant in derogation of the right of the public in the free and unobstructed use of the streets, and restrictive of the control of the proper agencies of the municipal body over them, or of the legitimate exercise of their powers in the public interest, will be construed strictly against the grantee and liberally in favor of the public, and never extended beyond its express terms when not indispensable to give effect to the grant.”

And again, in *Zanesville v. Fannan*, 53 O. S., 605, the Supreme Court, speaking with reference to the powers and the duties of municipalities with reference to their streets, said :

“Any permanent obstruction or incumbrance in any street of a municipal corporation is made a nuisance by statute (Revised Statutes, 6921), which the municipal authorities are vested with the power and charged with the duty of removing (Revised Statutes, 1690, 1878, 1934 and 2640); and those powers and duties continue when the railroad company has placed its structures in a public street, whether they were so placed under permission granted by the municipality, or under an appropriation for that purpose. In neither event are the municipal authorities divested of their powers nor absolved from the performance of their duties. Nor does Section 3283 contemplate that the railroad company, in the use of a street for the purposes of its road, under a right acquired in either of the modes provided, may destroy the same, or create a nuisance therein. On the contrary, it contemplates that the company shall exercise its rights with proper regard to those of the public in the street, and that the street

and its uses by the public shall be preserved and protected with such additional use as may be necessary in the particular appropriation by the railroad, which is itself a means of public use. If the permission to occupy the street be granted by municipal authorities, they may and should prescribe such reasonable regulations and conditions as will prevent the creation of a nuisance and preserve and best protect the free and full use of the street by the public. And in proceedings to acquire the right by appropriation, it can not be assumed as a proper basis for the estimation of compensation for damage that the company will destroy the street or create nuisances therein."

The case of *The Wabash Railroad Company v. Defiance*, 52 O. S., 262, was subsequently affirmed by the Supreme Court of the United States (162 U. S., 88). And it was held that there could be no contract, under Section 3283, by the council with a railroad company to permit the permanent maintenance of its bridge. The effect of the grant was simply that of a licensee. The court said:

"The general principle that the legislative power of the city may control and improve its streets, and that such power, when duly exercised by ordinances, will override any license previously given by which control of a certain street has been surrendered to any individual or corporation, is so well established, both by the cases in this court and in the courts of the several states, that a reference to the leading authorities upon the subject is sufficient. Indeed, the right of a city to improve its streets by regrading, or otherwise, is something so essential to its growth and prosperity that the common council can no more denude itself of that right than it can of its power to legislate for the health, safety and morals of its inhabitants."

Thus we see that we have not only to consider Sections 2640, Revised Statutes, and 6921, Revised Statutes, when reading Section 3283, but we must bear in mind what our Supreme Court has said with reference to the extent of the power sought to be conferred upon council by Section 3283, Revised Statutes. The limitation placed upon the council's rights to agree as to the manner of occupancy is made clear by these authorities and by these sections, and it is apparent that the occupancy is limited to a *joint* occupancy, "unless the Legislature, representing the sovereignty of the state, empower the municipal councils to make

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the larger grant and confer exclusive use." (Judge Price, 69 O. S., 414).

Was the "larger grant" conferred by the Legislature subsequent to the decision in the Elyria case? The railroad company, through its able counsel, ingeniously argues that such power has been granted, and that the Elyria case, *supra*, no longer controls; that since the decision in that case the statutes have been so modified that the municipal council is now vested with the power to permit the erection of stays or supports or abutments in any public street of any size or width. This express grant of power to council appears from an amendment, it is claimed, to Section 3337-1, Revised Statutes; and the amendment from which this power is deduced is in the following words (see 97 O. L., page 301):

"Unless placing and maintaining of the same be authorized by the city in which such crossing is situated, by ordinance duly passed."

Prior to this amendment Section 3337-1 (April 3, 1889, 86 O. L., 197) read as follows:

"Be it enacted by the General Assembly of the State of Ohio, That it shall be unlawful for any person, company or corporation owning or operating any railroad crossing, or that may hereafter cross, over and above any street less than seventy feet in width, in any city in this state, at an elevation above such street sufficient to permit persons to pass and repass along such street beneath such railroad crossing, to place or cause to be placed, or to suffer or permit to be or remain in such street beneath such railroad crossing or bridge, any pier or other stay or support for such crossing or bridge, or to suffer or permit any such railroad crossing or bridge to be or remain in such condition that any iron, coal or other hard substance, or any fluid or noisome matter may fall or drop from or through any such crossing or bridge upon persons traveling or passing beneath the same: and any such person, company or corporation, owning or operating any such railroad, failing to comply with the requirements of, or violating any of the provisions of this section, shall, for each and every day during the continuance of such failure or violation and on account thereof, forfeit and pay to such city the sum of \$100, which may be recovered in a civil action in the name of such city, against the owner or operator of such railroad, or both, as the city may elect, and thereafter like recovery may be had in such manner for subsequent failures and violations aforesaid."

Section 2. This section prohibits switching, constructing, and so forth.

Prior to the passage of the amendment above set forth, the railroad company contends that there was, by virtue of this statute, statutory power in council to permit a railroad to cross a public street or other ground, of any width, with a single restriction that in case the street crossed was less than seventy feet in width, no support might be placed therein. This power, it is urged, is clearly ascertained by reading Section 3283, Revised Statutes, and Section 28 of the Municipal Code, 96 O. L., 31 (which is the section giving to the council whatever power 3283 confers), and the act of April 3, 1889 (86 O. L., 187), together. That council is thus vested with the power referred to, it is urged, is the result of the application of the maxim "*Expressio unius est exclusio alterius*." 2 Lewis Southerland on Statutory Construction, Section 491; *Brown v. Maryland*, 12 Wheaton, 419; *Hankins v. The People*, 106 Ill., 628; *Manning, Bowman & Company v. Keenan*, 73 N. Y., 45.

And it is further contended that since the amendment of April 23, 1904, 97 O. L., 301, *supra*, the municipal council may now agree with a railroad to cross any public street with an overhead structure, and to place supports therein, no matter whether such street be more than seventy feet in width, or less. But such construction is a very strained one, and at the very best could only leave the court in doubt. Notwithstanding Tindall, C. J., and Chief-Justice Marshall and other eminent judges and writers, have long since recognized the value of the maxim *expressio unius est exclusio alterius* in the interpretation of statutes, it must not be forgotten that the rule is not of universal application; and all text writers agree that extreme caution must be exercised in its use. Endlich on Interpretation of Statutes, Section 398; Broom's Legal Maxims, page 653; Bishop, W. L., Section 249a; *Taylor v. Taylor*, 10 Minn., 107-113.

Approaching, then, the statute which is said to be the source of council's power, what do we find it to be as to its general terms and scope? The act itself is entitled, both in the original act and in the act as amended, "An Act to Protect Travelers on Streets and Highways." It is an act penal in its nature, and

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provides a penalty for the doing of that which it distinctly says shall be unlawful. It confers no power on a municipal corporation, and sought to confer none. It did, however, provide, by amendment, a means and a manner in which a railroad company might be exonerated from the penalty. That is to say, in the event that the placing and maintenance of the structure be authorized by the city, then no such penalty could be recovered by the city. But it can scarcely be argued that the effect of this amendment was to exonerate the defendant company from the penalty and at the same time legalize the structure.

And while we are thus straining at a construction that might show a grant of power, it would be well to bear in mind and keep before us the kind of authorization that our Supreme Court has said is required. "Moreover, to confer the exclusive use, the legislation must be express and clear to that effect, as held in *Ravenna v. Pennsylvania Company*, 45 O. S., 118." *L. S. & M. S. Railway Company v. Elyria*, 69 O. S., 435.

And again, at page 43, Judge Price says:

"To go beyond a joint occupancy or use of the street, the statute must speak in clear and unmistakable language. There can be no authority in such cases by implication unless it is unmistakable. This court has held the substance of this doctrine on more than one occasion."

Surely, then, in view of such language, the maxim *expressio unius est exclusio alterius* can be of little avail, and more especially so when it is sought to use, as the basis of the grant of express power to a municipal council, a statute *penal* in its nature.

As is pointed out by counsel, the municipal code, in granting power, uses apt language to make the grant. Section 7 (1536-100) provides:

"All municipal corporations shall have the following general powers, and council may provide, by ordinance or resolution, for the exercise and enforcement of the same."

And Section 9 of the Code (1536-102) provides:

"All municipal corporations shall have the following special powers which shall be exercised in the manner hereinafter provided."

When, therefore, we consider the manner in which the Legislature vests municipal councils with power, it would seem highly improbable that the Legislature intended to grant so important a power as the power to grant to others the exclusive use of the streets and public grounds, by an obscure amendment to a penal statute.

If, however, it were still urged that the Legislature did so intend, from any aspect the alleged investiture of power would be attended with so much doubt that, in consonance with the rule prescribed in such cases, we would be compelled to resolve the doubt against the municipal corporation. *Bloom v. Xenia*, 32 O. S., 461.

"The power of a municipal corporation is strictly limited. It has that which is expressly granted or clearly implied and no more; and doubtful claims to power are resolved against it." *Mintern v. Larue*, 23 How., 435, cited in *Bloom v. Xenia*, at page 465.

While it is proper, in endeavoring to arrive at the legislative intent, to consider the statutes *in pari materia*, I may say that such statutes to which I have been referred afford no further light. Some of these acts relate purely to bridge companies, not to steam railroads; other acts relate to grade crossings; but a statute with reference to an ordinary grade crossing could be of no avail in showing the intention of the Legislature to permit a *transverse* crossing over and along the entire *length* of a street or public landing, as is attempted in the case at bar.

Furthermore, none of these statutes to which I am referred can have any possible bearing, as far as I can see, upon the intention of the Legislature to permit council to grant *exclusive* rights to a railroad in public streets. I am utterly unable, in view of the foregoing, to find any authority whatsoever in council, whereby it undertook to grant to defendant railroad company the right to erect the structure proposed as complained of in the plaintiff's petition, thereby granting defendant an exclusive use in the parts of the public grounds to be occupied by the bents or stays or supports.

I must, therefore, hold that these ordinances, in so far as they grant to the defendant the right to erect such structures in public streets and public grounds, are void.

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The motion to dissolve the injunction must, therefore, be overruled, and I direct that the order of injunction herein be made perpetual against both defendants.

Jesse Lowman, City Solicitor, and *Walter A. DeCamp*, Assistant City Solicitor, for the city.

Ellis G. Kinkcad, *H. Kenneth Rogers*, *C. B. Ellis*, *H. L. Stone*, for the defendant.

LIMITATION AS TO TIME FOR BRINGING SUIT ON AN INSURANCE POLICY.

[Superior Court of Cincinnati, General Term.]

HENRY APPEL V. COOPER INSURANCE CO.

Decided, January, 1906.

Fire Insurance—Limitation of Time for Bringing Suit—Contract Valid. When—Burden of Showing Invalidity of, because Oppressive.

1. The provision of a policy of fire insurance, limiting the time within which a suit can be brought thereon to six months after the fire, is valid in the absence of circumstances indicating that the effect of the limitation upon the insured is harsh and oppressive.
2. The burden is upon the one complaining to show that the effect of the rule in a given case is such as to demand that its operation be suspended.

HOSEA, J.; FERRIS, J., and HOFFHEIMER, J., concur.

All questions arising upon the proceeding in error in this cause have been determined in the case of *Fire Association of Philadelphia v. Appel*, 4 N. P.—N. S., 41, excepting only the question peculiar to this action, namely, that relating to the limitation of time as to entering suit, and the opinion heretofore rendered in that case may be taken as applicable here. The residual question arises in this case upon a provision in the policy as follows:

“No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing

requirements, nor unless commenced within six months after the fire."

The policy also contains provisions with respect to furnishing proofs of loss, and, in case of disagreement, for submission of the questions of sound value and damage to appraisers or arbitrators, and providing that the sum so found to be due shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of loss have been received by defendant, including an award where appraisal has been required—such proof of loss to be made within sixty days after the fire.

The fire occurred on September 9, 1901, and upon disagreement between the company and the insured the arbitration was duly entered upon September 18, 1901; and an award made and returned by the umpire and one appraiser (the other having withdrawn and refusing to proceed) on October 9; and "proofs of loss" were filed on October 10, 1901. Suit was begun on June 4, 1902, about forty days after the expiration of sixty days succeeding the filing of the "proof of loss."

The referee to whom the case was referred below, finding the facts to be as in substance stated above, held as a matter of law that the plaintiff could not recover because he had failed to enter suit before March 9, 1902, that being the expiration of the time limit of six months from the date of the fire, allowed by the policy to the assured, and this was affirmed in the court below.

The plaintiff in error seeks in this proceeding a reversal of this judgment, and counsel present an imposing array of authorities, some of which hold such limitations void because of harshness evidenced by the circumstances of the cases; others modifying by construction the import of the provision so as to begin its operation only after the right of action accrues after filing proofs of loss; and another holding such limitations void as against the public policy evidenced by ordinary statutes of limitation.

The defendant in error, with equal zeal of counsel, presents a line of authority of no less cogency holding to the ordinary rule of construction: that where parties have put in clean unam-

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biguous language the terms of the contract by which they agree to be bound the court can not create a new contract between the parties by a construction not intended by themselves.

We think the true rule of decision in the present case lies somewhat between these extreme views, and is that the contract is to be upheld and enforced according to its terms, unless—and the burden is upon him who seeks to establish an exception to the rule—circumstances of a controlling nature are shown which would make an application of the rule manifestly unjust.

In the former opinion referred to, as against an equally binding stipulation, we found that the acts of the companies had practically rendered performance impossible for the insured and thereby excused performance. In the present case no such conditions appear to exist.

The only direct utterance of our Supreme Court upon the question of which we have knowledge is in *Portage Co. Mut. Fire Ins. Co. v. West*, 6 Ohio St., 599, 600, where a similar limitation existed in the charter of a mutual insurance company, and was challenged under a policy issued to one of its members. The court considers various reasons making an early adjustment of losses and liability desirable in the case of mutual insurance companies—and on principle they apply with some force to all—and, treating the policy of the member as a contract embodying this stipulation, says, page 604:

“The plaintiff’s liability to a suit, by what we have seen should be treated as terms of the contract, which the insured accepted for their protection against the loss, was limited to a period of time clearly specified, and it could not, after that limitation expired, be answerable to the defendants on their policy of insurance.”

It appears from the record in the case at bar that the company was served with proof of loss on October 10, 1901, subsequent to the termination of the arbitration proceedings; and that the company almost immediately and without availing itself of its sixty days privilege, announced its attitude denying liability. There remained to the insured then nearly five of the six months limitation of time in which to bring suit. There

were tentative efforts to bring about a compromise but no definite negotiations that can be taken into account as a suspension; and no other circumstances indicating that the limitation was in fact harsh or oppressive upon the insured. In the absence of such facts we can but affirm the judgment below upon the rule established in *Portage Co. Mut. Fire Ins. Co. v. West*, *supra*, and the general principle above stated, namely: that the stipulations of a contract otherwise valid are to be upheld unless shown to be unfair and unreasonable. 1 Page on Contracts, 356.

The question suggested by holding that such stipulations are invalid as against public policy, lately decided by the court of appeals of Kentucky, is an interesting one and may derive force from the decision of our Supreme Court in *Balt. & O. Ry. v. Stankard*, 56 Ohio St., 224, holding that the right of appeal to the courts is in its nature inalienable and can not be bargained away (citing Section 16, Article I, Ohio Const.). This question, however, is not properly before us on this record.

The judgment below must be affirmed, and it is so ordered.

Frank Seinsheimer and *John R. Saylor*, for plaintiff.

J. H. Cabell and *J. L. Kohl*, for defendant.

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Guardianship of James Edward Murray.

DOMICILE OF MINOR.

[Common Pleas Court of Lorain County.]

IN RE GUARDIANSHIP OF JAMES EDWARD MURRAY.

Decided, April, 1906.

Parent and Child—Guardian and Ward—Domicile of Minor—Jurisdiction of Probate Court—Section 6254, Relating to the Appointment of Guardians of Minor Residents.

1. A minor can not himself change his domicile, and as the residence of a minor is determined by the domicile of a parent or some person standing in the relation of a parent to him, the word "resident," as used in Section 6254, Revised Statutes, means "domicile."
2. Where the father who is the last surviving parent of a minor, dies while domiciled with the father's parents, and the minor continues, for a time after the death of his father to reside with the grandfather, the minor is a "resident" of the county in which the grandfather is domiciled, within the meaning of Section 6254, Revised Statutes of Ohio.
3. Where a minor five years old, so domiciled with his grandfather, is removed by his aunt, with the consent of said grandfather, to another county to live in and as a part of the family of such aunt, the domicile of such minor is not thereby changed so as to give the probate court of the county in which said aunt has her domicile, jurisdiction to appoint a guardian for said minor, while said grandfather is living and has not changed his domicile.

WASHBURN, J.,

By the report of the referee in this case it appears that he found the following facts:

That James Edward Murray, an infant about five years of age, was brought to Elyria by his aunt, Mrs. Loveland, on the 28th day of November, 1904, and about ten days thereafter, on December 9th, 1904, the probate court of this county appointed Mrs. Loveland guardian of said child.

It also appears from the findings of facts in said report, that said child had never lived in this county before that time; that neither his father or mother lived or died in this county, and that none of his grandparents ever lived in this county.

The report further finds, that his father, Patrick J. Murray, was born and raised in Wakeman, Huron county, Ohio, where he resided until he was married; that after he was married he

moved to Chillicothe and remained a year or so and then moved to Athens, Ohio, and lived there three years or more, and while he lived there his wife was stricken down with consumption, and he resigned his position, sold most of his household goods, packed the remainder and stored them in Athens, and that he and his wife and child went to Texas for his wife's health.

It further appears from this report, that he remained in Texas some two or three months, and his wife's health not improving, he came back to Ohio with his family; he stopped about a month with relatives in Toledo and then came on with his wife and child to Wakeman, and stayed there with his father and mother until he died; that soon after he returned to the home of his father he had shipped to him the balance of his household goods from Athens. That about six weeks after his return to his father and mother in Wakeman his wife died, and that about five months thereafter he died.

The report further finds that he abandoned his residence in Athens, Ohio.

His child, James Edward Murray, who was afterwards brought to Lorain county, was with his father all this time, and was with his father at said grandparents' home in Wakeman at the time of his father's death, and about ten days after the father's death said aunt, with the consent of the grandmother, brought said James Edward Murphy to this county.

The report further finds that after the death of Patrick J. Murray, the said grandparents, Michael Murray and Honora Murray were the natural guardians of said minor, James Edward Murray.

Other relatives of the child began proceedings in probate court, asking to have the appointment of said aunt, Mrs. Loveland, as guardian, set aside, on the ground that the Probate Court of Lorain County had no jurisdiction to appoint a guardian over said minor.

The probate court refused to remove said guardian, and the matter was appealed to the common pleas court.

In this court by agreement of the parties this case was referred to a referee, to report his findings of fact and conclusions of law, and the matter is now before this court on motion for a new trial and exceptions to said report.

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Said report finds as a conclusion of law drawn from the facts as above enumerated, although it is erroneously stated in the report as a conclusion of fact, "that said James Edward Murray, minor, had a residence in Lorain county, Ohio, on the 9th day of December, 1904," that being the day the guardian was appointed.

The facts as shown by said report upon which said referee based his finding of law, that said minor, James Edward Murray, was a resident of Lorain county on December 9, 1904, when the guardian was appointed, succinctly stated are as follows:

The mother of said minor was not domiciled in Lorain county at the time of her death, and never had been domiciled in Lorain county; the father of said minor was not domiciled in Lorain county at the time of his death and never had been domiciled in Lorain county; the grandparents of said minor were not at the time of the appointment and never had been domiciled in Lorain county.

The father and mother died at the home of the grandparents in Huron county, and the child was with them all the time they were at the home of said grandparents; and remained with said grandparents some days after the death of said father and mother; within ten days after the death of said father said minor was brought to the home of his aunt in Lorain county, who within ten days thereafter was appointed guardian by the Probate Court of Lorain County.

The statute under which the Probate Court of Lorain County made this appointment, reads as follows:

"The probate court of each county shall, when necessary, appoint guardians of minors, resident in said county." Section 6254.

"Resident" as used in this statute, means the same as "domiciled." Rockel, Vol. 2, Section 1322.

That is, merely living in the county with some one is not sufficient, if the domicile of the parent or some one standing in the relation of a parent is in another county.

It was expressly held under a similar statute in Alabama that "resident" was the same as "domicile." *Allgood v. Williams*, 8 Southern Reporter, 782.

In our state, even when our statute read that the court of common pleas should have power to appoint guardians for all minors "within their county" the Supreme Court treated "within their county" as meaning the same as "domiciled" in the county. In that case the minor had not resided in the county where the appointment was made for five years, and during all that time had been in the county but once, and then only for one day, and was not in the county at the time the appointment was made, but was then and had been for five years in another state, where he was apprenticed by his mother, his father being dead. The court held that "the father being dead, the mother was the natural guardian of the child," and the child's domicile was that of the mother, although he resided elsewhere. 12 O., 194; 34 O. S., 525, at page 534; see, also, 15 Pa. County Court, page 325; 13 Pa. County Court, page 179; 32 Northwestern Reporter, page 504; Law of Domicile, Jacobs, Section 75.

In order to give the Probate Court of Lorain County jurisdiction then, the minor must have been domiciled in Lorain county at the time of the appointment of the guardian.

The law is, that at the time of the death of the father the domicile of a minor is the domicile of the father at the time of said death, and in this case wherever the domicile of the father was, it is shown by said report that it was not in Lorain county.

Where the last surviving parent of a minor dies at the home of the grandparents of the minor, with whom said parent and said minor are residing at the time of the death of the parent, then said grandparent becomes the natural guardian of said minor, and if the minor continues to reside with said grandparent, then the domicile of said grandparent becomes the child's domicile.

The case then is, said minor on November 28, 1904, was not domiciled or residing in Lorain county, but was domiciled with his natural guardians in Huron county, and the only thing that would give the Probate Court of Lorain County jurisdiction to appoint a guardian of that minor, would be the changing of the domicile of said minor from said Huron county to Lorain county.

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How could that be done, and was it done in this case? These are important questions in this case, and their solution determine the jurisdiction of the Probate Court of Lorain County to appoint a guardian for said minor.

A minor can not himself change his domicile. American Law of Guardianship, Woerner, page 31; Schouler on Domestic Relations, Section 230; Law of Domicile, Jacobs, Section 229; 34 O. S., at page 535; 3 Ohio, 99.

The father is the natural guardian of the child, and while the father lives the domicile of the child is the same as that of the father. Law of Domicile, Jacobs, Sections 235, 236; 3 Ohio, 99.

The father can change the child's domicile only by changing his own domicile. Law of Domicile, Jacobs, Section 236; 17 Ohio State, 31.

After the father's death the mother became the natural guardian of the child, and the child's domicile is then the domicile of the mother. Law of Domicile, Jacobs, Section 238; 12 Ohio, 194; 5 Ohio, 315.

She can change the domicile of the child only by changing her own domicile. Law of Domicile, Jacobs, Section 240; 112 U. S., 458; 12 Ohio, 194.

"As infants have the domicile of their father, he may change their domicile by changing his own; and after his death the mother, while she remains a widow, may likewise by changing her domicile, change the domicile of the infants; the domicile of the children, in either case, following the independent domicile of their parents." Law of Domicile, Jacobs, Section 240; 112 U. S., 452.

After the death of both the father and mother, the grandfather becomes the natural guardian of the child. 114 U. S., 218; Reeve on Domestic Relations, 315; 15 Georgia, 414.

"As between two ancestors of equal degree, probably the one, would have the power to change the domicile, who first got possession of the infant, and with whom the latter actually resided." Law of Domicile by Jacobs, Section 245.

I know of no way in which the grandparent can change the domicile of the child except in the same way that the father or mother can change a child's domicile, and that is by changing

his or her own domicile. In fact a child's domicile never changes, except with the domicile of the father or mother or grandparent, or some other person standing in *loco parentis*, or by operation of law, as where the surviving parent dies, domiciled at a place other than the domicile of the grandparent, when, if the child goes to live with the grandparent, and actually resides with and becomes a member of the family of the latter, its domicile is changed to that of the grandparent. 114 U. S., 218.

How then stands the case at bar?

From the report of the referee we find that James Edward Murray, at the time of the death of his father, who was his surviving parent, resided with his grandfather in Huron county, where his father died, and that he continued for a time after his father's death to reside with said grandfather, who was his natural guardian.

He was then, in law, domiciled in Huron county, with his grandfather, and while his grandfather lived the child's domicile could be changed only by the change of his grandfather's domicile; at least, no one not the natural guardian of the child could change its domicile by removing it to another county. 26 N. Y. Supplement, 606.

In this case the grandfather is still living and is the natural guardian, and the aunt was not the natural guardian, and the grandfather not having changed his domicile to this county the domicile of said James Edward Murray was not changed by his being brought to Lorain county by his aunt; and the Probate Court of Lorain County was without jurisdiction to appoint a guardian for him on December 9, 1904.

There is a finding in the report, in reference to the domicile of the father at the time of his death, which, if I were permitted to consider the bill of exceptions in this case, I would find to be incorrect; but in the view I take of it, that is of little importance, so long as the referee found that the father was not a resident of Lorain county at the time of his death.

The report as to matters of fact alone, that is, primary facts, will be confirmed, but the referee's conclusions of law and called by him conclusions of fact are not approved, and the decree

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based upon the primary facts found by the referee, is that said guardian be removed because the Probate Court of Lorain County had no jurisdiction to appoint her.

I feel as the probate judge and the referee felt, that the person appointed guardian in this case is a proper person, and that the best interests of the child would be conserved by permitting the child to remain in the home of said guardian; but the question presented by this case is purely one of jurisdiction, and what would be best for the child can not change the law, which seems to me to be plain and to demand the decree I have entered.

G. A. Resek, Clayton Chapman and P. H. Moroney, for plaintiff.

E. G. & H. C. Johnson and Lee Stroup, for defendant.

REMEDY OF ONE ACCUSED UNDER THE JONES LAW.

[Common Pleas Court of Greene County.]

H. E. SCHMIDT ET AL V. WILLIAM F. BRENNAN ET AL.

Decided, May, 1906.

Seizures—Under the Jones Law—Discretion of Officials can not be Interfered with by Injunction—Remedy of Defendant—Pleading.

1. A court of equity will not undertake to determine in advance whether or not vessels and fixtures are being used for the unlawful sale of intoxicating liquor, as alleged by municipal officers who are about to seize and destroy them under authority found in 98 Ohio Laws, page 12.
2. An allegation that an act is unlawful does not make it unlawful, and a demurrer to a petition containing such an allegation does not admit the truth of the allegation in the sense that it thereupon becomes the duty of the court to act upon the petition as though its truth were established.
3. The proper remedy for one unlawfully arrested and whose vessels and fixtures are about to be seized under this act, is in a petition in error, or a suit against the officials and their bondsmen for damages, or for a writ of habeas corpus, and not in an action for an injunction.

BELDEN, J.

This action is before the court for determination of a demurrer filed by the defendants to the petition of the plaintiffs, on the

ground that the allegations set forth in the petition do not constitute a cause of action.

The plaintiffs in their petition set out that the defendant, William F. Brennan, is the duly elected, qualified and acting mayor of the city of Xenia, in this county, a municipal corporation, and that the other defendants, E. M. Smith, William B. McAllister, Edward Williams and Michael Graham are duly appointed, qualified and acting officers and members of the police force of said city.

It is further averred that the plaintiffs are the owners of a certain four-story brick building in said city, together with the ground on which the same is located, and the plumbing, and all other fixtures in said building. That the above named defendants maliciously and unlawfully threaten and are about to, unless enjoined from so doing by this court, forcibly enter upon said property, and under the false pretense that a certain room therein is used for the unlawful sale of intoxicating liquors as a beverage, break, destroy, damage, injure and carry away a portion of said building and fixtures, destroy and injure the floor tiling and plumbing, and damage and destroy the fixtures attached to the freehold, to the great and irreparable injury of the plaintiffs, and against which they have no adequate remedy at law.

It is further alleged that each and all of said defendants named are execution proof, and no damages could be collected from them, or either of them; and that the acts named herein and injuries contemplated by defendants, will be a permanent injury to the freehold and property of these plaintiffs. That no part of said property is used for the unlawful sale of intoxicating liquors as a beverage, and that the property so about to be forcibly seized, damaged and destroyed, does not consist in whole or in part of any vessel, or furniture used for the sale of intoxicating liquors as a beverage. That said defendants are about to act without law or authority, and arbitrarily to injure and destroy the plaintiffs' property.

Wherefore, the plaintiffs pray that the defendants, and their agents, servants and employes may be enjoined from injuring, destroying or carrying away any portion of plaintiffs' freehold and fixtures, and that until the final hearing of this cause, they

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may be so restrained and enjoined, and plaintiffs pray for such other and further relief as they may be entitled to in law or equity.

A temporary restraining order was granted when the petition was filed.

No mention is made in this petition of the law under which the defendants act, or assume to act. But in the briefs filed by counsel reference is made to what is known as the "Jones law," passed by the General Assembly of this state February 23, 1906, and found in Vol. 98 O. L., pp. 12 to 18, inclusive. That this law has something to do with the case is evident from the averments contained in the petition as to intoxicating liquors, vessels, etc.

Counsel for defendants claim that the demurrer should be sustained upon three grounds, namely:

1. That the court is without jurisdiction to enjoin the police department and the mayor from acting within their discretion in the enforcement of the law.

2. That the facts stated in the petition are not sufficient to warrant a court of equity in interfering.

3. That this court can not determine in an equity proceeding whether or not there is an unlawful sale of intoxicating liquors as a beverage.

Counsel for plaintiffs state in their brief that the constitutionality of the Jones law is not assailed, and that without violating the injunction, defendants may enter upon the real estate described in the petition, make diligent search, and, if any intoxicating liquor be found, seize it, together with any vessels containing it and any furniture kept for illegal selling, and that the defendants are enjoined merely from violating the limitations of their lawful powers by damaging the real estate of plaintiffs under a claim of right.

Several cases are cited on behalf of plaintiffs which support the doctrine that a court of chancery has jurisdiction to interfere by injunction when public officers are proceeding illegally or improperly under a claim of right, to do an act to the injury of others. Not one of the decisions cited, however, is to the effect that a criminal proceeding can be enjoined by a court of equity.

In my opinion, the first reason assigned on behalf of the demurrer is well taken.

“A municipal corporation being a political body, clothed with certain legislative and discretionary powers, equity is ordinarily averse to interfering by injunction with the exercise of those powers at the suit of a private citizen. And no principle of equity jurisprudence is better established than that courts of equity will not sit in review of the proceedings of subordinate political or municipal tribunals, and that where matters are left to the discretion of such bodies, the exercise of that discretion in good faith is conclusive, and will not, in the absence of fraud, be disturbed.” High on Injunctions, Section 1240 (2d Ed.).

It is sought by this petition to have this court determine in advance of any trial in the mayor's court, that the vessels and fixtures in the building are not used for the unlawful sale of intoxicating liquors. This would be the question for trial in the mayor's court. The arrest of the plaintiffs and seizure of their property are matters within the discretion of the officials who are clothed by law with the duty of deciding whether or not there has been a violation of any statute law of this state; and the judge of a court of equity will not substitute his judgment for the judgment of an official invested by the Legislature with authority to decide all questions of this nature.

“No court has jurisdiction to interfere with the public duties of any of the departments of the government, or to override the policy of the state; and a court of equity is without power to enjoin the exercise of the police powers given by law to the officers of a municipal corporation, so as to prevent such officers from preserving the public peace. Nor will an injunction issue to restrain an interference by the police authorities with the business of a liquor dealer by arresting him and his employees. If the arrests are illegal, *habeas corpus* and suits for damages afford him ample remedy.” Spelling on Extraordinary Relief. Section 628.

The allegation in his petition that the defendants are insolvent, is not sufficient to establish the plaintiffs' right to an injunction.

Under the law of this state all officials of municipal corporations are required to give bond for the faithful performance of their duties. Section 1536-997, Revised Statutes.

“The law presumes that public officers have faithfully performed all the duties of their offices, until it is otherwise made to appear.” *Mitchell v. Treas. Franklin Co.*, 25 O. S., 143.

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"Where the defendant is an officer who has given bond with sureties, it is not sufficient to allege that he is negligent in a suit to enjoin him from performing his official duties, but it must be alleged that his sureties are insolvent." *Wells v. Dyer*, 11 Nev., 161.

In the case at bar it is not stated how valuable the property is which it is alleged the defendants are about to seize unlawfully. But it is not to be presumed that it is of such great value that the sureties upon the bonds of the officials could not respond in damages so as to give adequate relief to the parties injured.

It also seems to this court that the facts stated in the petition are not sufficient to warrant a court of equity in interfering. It is alleged in behalf of the right to an injunction that the demurrer admits the truth of the petition—that defendants are acting maliciously, in violation of the law, and beyond the limits of their powers, and are about to injure and destroy property not specified as subject to seizure in any law, and property not used in violation of law.

An allegation that an act is unlawful is not sufficient. In the case of *Rutter v. Henry*, 46 O. S., 272, our Supreme Court has said:

"It is assumed by counsel for defendant that the plaintiff admitted, by not denying, that the horse was 'unlawfully running at large,' as it is alleged in the answer. This view magnifies the legal significance of this averment. It means no more than that the horse was running at large—whatever that is. The meaning is not enlarged by the epithet employed. It involves no issuable fact. Whether it was unlawfully running at large depends upon the facts, and these are not stated. Beyond the fact that the horse was 'at large,' the averment is a mere conclusion of the pleader."

"The use of the words 'unlawfully,' 'maliciously,' and 'wantonly' adds no force to the complaint. In considering the complaint and in determining the rights of the parties, the court looks to the nature of the acts alleged, and if such acts are lawful within themselves, such epithets are of no avail." *Tyner v. People's Gas Co.*, 131 Ind., 408. Cited, 10 E. P. & P., 956, note.

"A court of chancery will not interfere to prevent a mere trespass. Where adequate compensation can be had in an action at law, there is no ground to justify the interposition of a court of equity." *Bank v. Debolt*, 1 O. S., 592; *McCoy v. Chillicothe*, 3 Ohio, 371; *Ross v. Page*, 6 Ohio, 166.

It is true, in later decisions of our Supreme Court they have held that repeated acts of trespass which in time would ripen into prescriptive right will entitle the aggrieved party to an injunction. But it is not claimed in this petition that there will be any repeated acts of trespass.

The third point made in behalf of the demurrer is also, in my opinion, well taken. If every one who is arrested, or whose property is seized by an official, can apply to a court of chancery for an injunction against the official, alleging that he is innocent, our courts would soon be clogged with cases of this kind.

Writs of habeas corpus, petitions in error and suits against the officials and their bondsmen for damages afford, in my judgment, ample remedy to any person who is injured by an unlawful arrest or seizure of property.

"The ground upon which the interference of a court of equity is invoked is, that the mischief to complainant's property is irreparable, and that actions at law furnish no adequate relief.

"While this is an admitted ground of equity jurisdiction, courts of chancery will carefully abstain from interference, where the injury will support an action at law, unless the party seeking such aid brings himself within the clear principle of equitable relief. But, in cases of this sort, equity will not interfere until the rights and the facts have been established beyond doubt at law." *McCord v. Hunt*, 12 Ohio, 387-389.

"A court of equity will not enjoin criminal proceedings." *Bispham's Equity*, Section 412, p. 470; Section 424, p. 480 (4th Ed.)

"A court of equity is not as a general thing a proper place to enforce the provisions of the criminal law." *Boiler & Engine Co. v. Benner*, 14 L. D., 357-361.

"An injunction which would operate as a restraint upon the governmental and discretionary powers of the municipal authorities can not be allowed." *Schlemmer v. Steinman*, 2 N. P.—N. S., 293, 298.

"Courts of equity are governed by fixed rules equally with courts of law, and there is no rule or principle of equity that warrants the interference by injunction to restrain the exercise of a function of a co-ordinate branch of the government." *Railway Co. v. Vickery*, 11 Dec., 629.

For the reasons above stated, the demurrer is sustained, and the temporary restraining order heretofore allowed vacated and dissolved.

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State, ex rel, v. National Banks.

If plaintiffs desire to amend, they may have leave to do so and apply for a new restraining order. If appeal is desired, bond will be fixed at the sum of one hundred (\$100) dollars.

H. C. Armstrong and Sprigg, Fitzgerald & Sprigg, for plaintiffs.

W. L. Müller, for defendants.

INTEREST ON PUBLIC FUNDS.

[Common Pleas Court of Miami County.]

STATE, EX REL CAMPBELL, PROSECUTING ATTORNEY, v. NATIONAL BANKS.

Decided, June, 1906.

Banks—Liability of, for Interest on Public Deposits—Where the Character of the Deposits are Known—Relation of Quasi Trustee Created—Nature of Action for Recovery of Interest—Authority of the Prosecuting Attorney.

1. Where a county treasurer without authority under the depository law, deposits the public funds with a bank which receives the funds with full knowledge of their character, and loans the same at interest, such bank will be required to account to the public for the interest so received.
2. The prosecuting attorney has authority to bring the action requiring the banks to account for, and restore such interest.

ALLREAD, J.

These actions are brought in the name of the State, for the use of Miami County, on the relation of the prosecuting attorney separately against each of the four national banks. It is alleged in brief, that the county treasurers of Miami county, in consideration of the banks paying to such treasurers the premiums for the official bonds, agreed with the banks that the public monies should be divided and deposited in such banks, and that in pursuance thereto one-fourth of the public monies from September, 1900, to the present time, has been deposited in each of the four banks named. That said banks obtained said funds well knowing the same to be public funds of said county, and after obtaining possession of the same as aforesaid, commingled the same with their own funds and loaned the same at interest and otherwise used said public funds as their own.

There are two causes of action representing the time covered by the terms of office of different treasurers. In the first cause

of action, it is conceded that the banks have accounted in full for the principal sum deposited, while in the second cause of action it is claimed that a portion of the principal sum still remains on deposit.

The prayer of the petition is for an accounting of the public funds claimed to be in the hands of the banks and of the interest thereon.

It is urged that the prosecuting attorney has no legal capacity to bring this action. Whether he has or not depends upon the scope of Section 1277, Revised Statutes. Originally this section was not broad enough, but with the present amendments it is sufficiently comprehensive to sustain the action. j

The main contention is as to the liability of the banks for interest. The statutes of this state until the depository law was enacted and still, except as provided by that act, prohibit the county treasurer from loaning public funds with or without interest. But, if the treasurer nevertheless does loan the funds and secures a profit for himself, he is required to account for such profit to the county. *Eshelby v. The Board of Education*, 66 O. S., 71; *Incorporated Village of Glenville v. Englehart*, 19 C. C., 285.

The principle upon which this liability is founded is that the treasurer is merely the custodian and does not acquire title to the public funds.

It is equally clear, although no decision has been found in this state, that where a mere custodian of public funds deposits or loans them to a bank or other depository having notice of their character, no title to the funds is acquired, but such depository holds the same as a voluntary or quasi trustee. 2 Pomeroy on Equity, Sections 688, 1051; *State v. Foster*, 63 American State, 47; 29 L. R. A., 226; *Marquette v. Wilkinson*, 43 L. R. A., 40; *American Bonding Company v. National Mechanics Bank*, 99 Am. State, 466; *School Trustees v. Kerwin*, 29 Ill., 62; *National Bank v. Insurance Co.*, 104 U. S., 54; *Holmes v. Gilman*, 138 N. Y., 376; *Bircher v. Walthe*, 163 Mo., 461; *Independent District of Boyer v. King*, 80 Ia., 497; *Lincoln Savings Bank & Safe Deposit Co. v. Morrison*, 57 L. R. A., 885.

In the case of *National Bank v. Insurance Co.*, *supra*, it is said that while the relation of a bank to its depositor is ordinarily that of debtor and creditor, yet if the money deposited is

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held by the depository in a fiduciary capacity and is knowingly accepted by the bank, the fund in the hands of the bank is still impressed with the original trust and the bank assumes thereby a fiduciary relationship. Mr. Justice Matthews in the opinion cites with approval from the opinion in the case of *Pennell v. Deffell*, 4 De. G., M. & G., 372, as follows:

"It is, I apprehend, an undoubted principle of this court, that as between *cestui que* trust and trustee and all parties claiming under the trustee otherwise than by purchase for valuable consideration without notice all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust."

In the case of *The Ind. District of Boyer v. King*, *supra*, it is held that while ordinarily in case of a deposit the title to the money is transferred and the relation of debtor and creditor arises, this is not so as to public funds deposited with full knowledge of their character. In such case, the trust character of the fund still remains.

In case of *Holmes v. Gällman*, *supra*, it is held that the *cestui que* trust can follow the trust funds and claim the property into which such funds have been invested, together with its increase, providing such trust fund can be clearly ascertained. Peckham, J., in this case says:

"The right has its basis in the right of property and the court proceeds on the principle that the title has not been affected by the change made of the trust funds and the *cestui que* trust has his option to claim the property and its increased value as representing his original fund."

In the Nebraska case, 57 L. R. A., 885, it is said:

"The profits of trust money belong to the *cestui que* trust, and we see no warrant for limiting recovery to the actual sum invested."

In *State v. Foster*, *supra*, it is directly decided that the bank receiving deposits of public funds with knowledge of their character, becomes a *quasi* trustee and stands in the shoes of the depositing treasurer.

It is asserted by counsel for the banks, that if the depositing of the money by the treasurer in the banks be found to be illegal, no cause of action can be founded for the return of the

principal or the interest. The doctrine is well established that no action can be maintained even by the state or its subdivisions upon an illegal contract (*State v. Buttles*, 3 O. S., 509; *Board of Education v. Thompson*, 33 O. S., 321). If, therefore, this cause of action was founded upon an illegal contract, the action could not be maintained, but in the case last cited a distinction is drawn between a suit upon the contract of loan or deposit and one for the restoration of money to its proper custody. It is said in the opinion (page 328) that an action for the restoration of the money to its proper custody would not be an action on the illegal contract, but in repudiation of it.

The action here is not founded upon the contract of the treasurer with the banks, but it is for an accounting of the public money in the hands of the banks and thereby to secure its restoration to the proper custody. This accounting may therefore include not only the principal of the public funds but any accretion in the way of interest. While it necessarily follows that no interest can be allowed upon the contract of loan, either express or implied, yet, if the public money in the hands of the bank was actually loaned at interest by the banks, as this petition avers it was, all profits or increments so arising would become a part of the fund itself and should be accounted for and restored to the public treasury.

It is not necessary to determine at this stage whether the liability for interest is confined to the investments or loans into which the public fund has been traced, or whether the commingling of the public funds with the general deposits of the bank would of itself create a liability for interest. Such question will more properly arise upon the trial of the case. The averment that the public funds were loaned at interest is sufficient against a general demurrer to create a liability.

It is also urged that a demand is necessary to create a liability for interest or a return of the funds, but the liability of the banks for the earnings of the public funds does not depend upon demand, nor does the liability for an accounting or restoration of the funds to their lawful custody depend upon a previous demand.

The demurrer to the petition is therefore overruled.

A. R. Campbell and Gilbert & Shipman, for plaintiff.

M. H. Jones, A. F. Broomhall, T. B. Kyle and R. J. Smith, for defendants.

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INFERENCES AS TO NEGLIGENCE.

[Common Pleas Court of Lorain County.]

GRACE R. HAMILTON, ADMINISTRATRIX, v. THE LAKE SHORE &
MICHIGAN SOUTHERN RAILWAY COMPANY.

Decided, May 25, 1906.

*Negligence—Verdict Based on Claim—That Car Brake was Defective—
Claim a Presumption only—Unsupported by Evidence—Burden of
Proof—Scintilla Rule—Charge of Court—Section 3365-21.*

In an action for damages for wrongful death, where the only evidence of negligence is an inference drawn from circumstances, and other circumstances are proven, from which the inference of the absence of negligence is clearly a more natural and stronger inference, and the verdict is for the plaintiff, upon whom the burden of proof rested, it is the duty of the court to see that the party on whom the burden of proof is cast sustains that burden, and to set aside a verdict, which is in effect based upon the conjecture of the jury that the defendant was negligent.

WASHBURN, J.

This case is submitted to the court on motion to set aside the verdict of the jury and to grant a new trial. At the trial of the case the defendant submitted the case to the jury upon the testimony of the plaintiff, and without argument. The facts about which there was positive testimony are not much in dispute, and briefly stated they are as follows:

The defendant railway company owned and operated a gravity switch-yard at Collinwood, Ohio; in that switch-yard was a track known as track number twelve, which, so far as the part involved in this case is concerned, had a slight descending grade to the westward; said track to the west connecting with a lead track, and was slightly lower at the westerly end connecting with said lead track than the easterly part of said track back twenty-five or more car lengths from where it connected with said lead track.

On the night in question a flat car loaded with steel rails, which so far as the positive testimony is concerned, was comparatively a new car on that day, was standing on said track number twelve, some four or five car lengths east of its intersection with said lead track; said car was not attached to any other cars, and it was either held in place by its brake being set or because the track was level enough for it to stand there without running to the westward; and considering the grade of the track and what happened afterwards, the most natural inference is that the brake on said car was set; but there is no direct evidence that the brake was properly set, that is, set so that moving the car would not release it, even if it was not defective.

Soon after dark a certain switching crew, desiring to use the west end of track number twelve, backed some twenty cars and a caboose, which was on the easterly end of said twenty car train, up track twelve and against this car, and the brakeman, who without orders from any one else, but upon his own discretion used said track, testified that he did not let off the brake of said flat car when it was backed up, and that from the grinding noise when it was backed up, he is sure that the brake was set, although he at no time examined said brake, and says that he at no time released it or set it.

He further testifies that after the car was backed up some twenty car lengths, and the caboose was coupled to it, he cut off the rest of the train on the west, except said caboose and four cars, and left said caboose and said four cars attached to said flat car, with no other brake set except the one on said flat car, and was engaged in making up his train for about fifteen minutes, and then the train as made up was backed in on track number twelve and attached to said four cars and caboose, and that he then uncoupled the caboose from said flat car and the train pulled out to the west.

The plaintiff's decedent, Harley W. Hamilton, was then upon a switch engine headed eastward on a track a little to the west of where said track number twelve connects with said lead track; and immediately upon the passing of said train west, said switch

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engine on which the said Harley W. Hamilton was standing moved in an easterly direction and on to said lead track and along the same, and when it got to the point where said track number twelve leads into said lead track a collision occurred between said switch engine and said flat car which was moving of its own momentum in a westerly direction about two miles an hour, and in said collision said Harley W. Hamilton was killed.

With the exception of what has been said, so far as the evidence is concerned, nothing is known as to the actual condition of said brake before the collision. At the time of the collision the load of rails on said flat car shifted and broke the brake-staff of said car and detached it from the car.

On cross-examination of one of the plaintiff's witnesses the defendant brought out the fact, that within a few hours after the accident said car was inspected by one of the inspectors of the defendant company, and he testified that the car was a comparatively new one, and that with the exception of the broken brake-staff, the brake was in good order and not out of repair in any particular.

The important issue in the case was as to whether or not the brake on said car was defective, for if it was defective, and that defect caused the collision, the defendant having failed to introduce any testimony showing that it used due diligence to ascertain the existence of such defect, then under the provisions of Section 3365-21, Revised Statutes, the company in law knew of such defect, and was therefore negligent.

At the trial of the case the court felt that under the scintilla rule in this state, the question of whether or not said brake was defective should be submitted to the judgment of the jury; and under the charge the jury must have found that the brake was defective. And now the question for the court is, whether or not that finding is so clearly wrong as to justify the court in setting aside the verdict.

The only negligence submitted to the jury in this case, was the use by the defendant of said flat car when the brake was in a defective condition.

There is no direct evidence in support of such negligence. That is, no witness who saw and examined the brake has testified that the same was defective, and no particular defect in this particular brake was pointed out or even hinted at in the evidence. The circumstances, and the only circumstances in the case which justified the inference that said brake was defective, is the fact that the car escaped and ran down the track, and that would have little force and effect, unless it was a fact that when said car was left the brake thereon was properly set.

If the brake was set, then the car having escaped so soon after the train left it, the inference would be natural that there was some defect in the brake, or that the brake was not properly set, or that some one released the brake.

On the other hand, if the brake was examined immediately or soon after the accident, and found not defective then, the inference would be just as strong that the brake was not defective before that time, in fact it would be a more natural inference, because if soon after the accident the brake was found to be not defective, it very likely was not defective a few minutes before, while there might be some circumstance, other than a defect in the brake, which would account for its releasing, such as the improper setting of it.

The burden of proving that the brake was defective is upon the plaintiff, and that is so, notwithstanding the provisions of the statute hereinbefore referred to. Under that statute a *prima facie* case of negligence is only established when "the fact of such defect shall be made to appear in the trial."

In a very recent case where this statute is considered, it is said that—

"The rule is, that he who affirms must prove, and when the whole of the evidence upon the issue involved, leaves the case in equipoise, the party affirming must fail." 74 O. S., page —; Ohio Law Reporter Supplement, page 67.

"Where an injury may have been caused by one of two things, one of which might have happened through causes without negligence on the part of the defendant, the jury will not be per-

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mitted to guess that it happened on account of the other." 13 Ohio Decisions, page 208.

"To establish negligence there should be either direct proof of the facts constituting such negligence, or proof of facts from which negligence may be reasonably presumed; there should be no guessing by either court or jury." 63 O. S., page 236.

"In the absence of direct evidence in its support, an allegation that one sustained injuries by reason of the negligence of the defendant, is not sustained by proof of circumstances from which the fact that his injuries were so sustained is *not a more natural inference than any other*." 58 O. S., page 426.

In accordance with the law as laid down in the cases above referred to, the jury were instructed in this case as follows:

"There has been no direct evidence in support of the claim of the plaintiff that said brake was defective. By that I mean, no witness who saw it and examined it, has testified that it was defective; but the plaintiff claims that the allegation that the brake was defective has been sustained by proof of circumstances from which the defect in the brake is naturally inferred.

"But, in the absence of direct evidence in its support, the allegation that the brake was defective is not sustained by proof of circumstances from which the fact that the brake was defective is not a more natural inference than any other, for where an injury may have been caused by one of two things, one of which might have happened through causes without negligence on the part of the defendant, the jury will not be permitted to guess that it happened on account of the other.

"You should consider whether or not the natural inference from the circumstances is, that said brake was defective, and whether or not such inference is a more natural inference than any other. If not a more natural inference, then you should not find that the brake was defective."

As I have said, the jury must have found that the inference that the brake was defective was more natural than any other. That is all there is in the case to sustain their verdict of \$4,000 against the defendant.

I think that such finding by the jury was clearly wrong. The inspector testified positively that he examined the brake soon after the collision, and that it was not defective. That raises

a natural and very strong inference that it was not defective at the time of the collision.

Had the brakeman who moved the car and left it last positively testified that he set the brake or examined it after it was set, and that it was *properly* set, that would raise a natural and very strong inference, in view of what happened to the car so soon after, that there was a defect in the brake; but the brakeman does not so positively testify.

On the other hand, his testimony that the brake was *properly* set is but an inference or a deduction on his part from other circumstances.

So that the inference that the brake was defective is really an inference upon an inference. That is, one of the facts from which the inference is drawn, to-wit, that the brake was *properly* set, is itself but an inference from other circumstances.

As the inference that the brake was improperly set is as natural as the inference that it was defective, then, in view of the inspector's testimony, the inference that the brake was defective is not warranted, when all the circumstances of the case are considered.

And the burden of proof being upon the plaintiff, the jury was clearly wrong in the verdict which it rendered.

If the brake was set at all before the collision, then, according to the testimony, it was performing its function of holding the car, and was apparently all right just before the collision, and just after the collision it was examined and found to be all right and not defective; then to say that the brake was defective because the car ran down the track, is, in the absence of other evidence of defect, substituting conjecture for proof.

There was no direct evidence of negligence on the part of the defendant, and the inference that the brake was defective, being as I have said, an inference upon an inference, was really but a guess that the defendant was negligent, and that is not sufficient to sustain the verdict, and the verdict will, therefore, be set aside and a new trial granted.

It takes more than the evidence necessary to satisfy the scintilla rule to sustain a verdict when the court is asked to over-

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rule a motion to set aside a verdict on the ground that it is against the weight of the testimony.

Where there is a conflict of testimony the court naturally and properly places great reliance on the judgment of twelve men, and will not disturb a verdict, unless it is so clearly wrong that the judge feels justified in substituting his judgment for the judgment of twelve men.

But where there is practically no conflict in the testimony, and the only question is, as to what is the most natural inference to be drawn from certain circumstances, it is the duty of the court, under the decisions above referred to, to see that the party on whom the burden of proof is cast, sustains that burden, and that the verdict is not based upon a mere conjecture that the defendant was negligent.

F. M. Stevens, C. W. Dille and E. J. Pinney, for plaintiff.

E. G. & H. C. Johnson, for defendant.

COUNSEL FEES IN FAMILY LITIGATION.

[Superior Court of Cincinnati, General Term.]

SARA HOPPLE ET AL V. CASPER V. T. HOPPLE.*

Decided, November 27, 1903.

Attorney and Client—Husband and Wife—Parent and Child—Counsel Fees in Suit between Husband, Wife and Son Involving Property Rights.

In an action brought by a husband to wrest from his wife an interest in land belonging to him, and also the interest belonging to the wife and the interest belonging to their son, the wife and son can not be compelled to pay the counsel fees due from the husband and earned in his undertaking to deprive them of their property.

SMITH, J.; FERRIS, J., and HOSEA, J., concur.

The action below was by Casper V. T. Hopple against the defendant, Sara H. Hopple, to have her declared a trustee for him of a large amount of real estate in this city.

*Affirmed by the Supreme Court without report, May 16, 1905 (72 Ohio State).

The petition alleged that on different occasions prior to July, 1898, Casper Hopple conveyed by deeds to Sara H. Hopple a large number of pieces of real estate—

“Under the express understanding and trust, to which the defendant, Sara H. Hopple, assented and agreed and then and there received the deeds under said agreement and trust, that is to say, as follows:

“Said property was to be held by said Sara H. Hopple as the property of Casper V. T. Hopple, the plaintiff herein, and for his use and benefit, and the proceeds thereof were to be held and collected and accounted for as the property of the said Casper V. T. Hopple the same as if he had not transferred and conveyed the legal title of record to the said Sara H. Hopple; and the said Sara H. Hopple was to hold the said property for said Casper’s use and benefit and not for her own.”

The prayer of the petition was that the defendant, Sara H. Hopple, be declared to hold the property according to the trust above set forth and for such other relief as he might be entitled to.

Sara H. Hopple in her answer denied that the conveyance made to her by plaintiff were made under any express understanding and trust, and denied that she received deeds for the same under any agreement and trust; on the contrary she alleged that the conveyances made to her were absolute.

After a protracted trial the court found from the evidence that the several deeds mentioned in the petition were not intended by the plaintiff to be absolute conveyances but as deeds conveying the real estate to Sara H. Hopple in trust for the plaintiff; and that the terms of the trust were that she would always hold the property for the support and maintenance of the plaintiff, Casper V. T. Hopple, and the defendant, Sara H. Hopple, his wife, and their only child, William Hopple.

It was further ordered that inasmuch as Sara H. Hopple had denied the said trust and refused to carry out the same that within thirty days after the entering of the decree she should convey the property to Casper V. T. Hopple, or in default of such conveyance the decree should operate as such conveyance.

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It was further ordered that plaintiff pay to Sara H. Hopple for her support and maintenance the sum of one hundred and twenty-five dollars (\$125) per month during her natural life and should pay to her three hundred dollars (\$300) a year for the maintenance and support of the said William Hopple until he should reach the age of twenty-one years.

It was further decreed that the amount to be paid to Sara H. Hopple for herself and son should be a lien and perpetual charge upon all the real estate ordered to be conveyed by Sara H. Hopple to the plaintiff.

The decree then follows with these two clauses:

“And it is further ordered that the sum of five thousand dollars (\$5,000) be allowed as counsel fees herein to Edward Colston and Wallace Burch for their services herein rendered, and that the same be made and taxed as a part of the costs of the case.

“It is further ordered by the court that all the costs of this case including the counsel fees aforesaid be, and the same are hereby made a charge and lien upon the premises and property involved herein and ordered to be conveyed to the plaintiff by the defendant, Sara H. Hopple, and payable out of the same, ahead of and prior to and preferable to any other lien or liens therein provided for, and execution or other proper process for the collection thereof is hereby awarded.”

The plaintiff in error excepts to the decree of the court as a final determination of the rights of the parties except the part which taxes the fee of counsel for plaintiff as part of the costs of the case and makes the same a lien upon the property prior to the charges upon it made by the decree in favor of herself and her son; and prosecutes error for a reversal of those parts of the decree.

The general rule is that the attorney's fees of parties to any suit are not taxable as costs (5 Ency. of Pl. and Practice, 228, Section 2; *Constant v. Matteson et al*, 22 Ill., 546-560; *Otoe County v. Brown*, 16 Neb., 397-398).

And as a general rule where land is recovered by an action at law or in equity, counsel fees for the party so recovering title are not taxable as costs (*McCullough v. Flourny*, 69 Ala.,

189; *Higley v. White et al*, 102 Ala., 604; *Hanger et al v. Fowler*, 20 Ark., 667; *Humphrey et al v. Browning*, 46 Ill., 476; *Martin v. Harrington*, 57 Miss., 208; *Smalley et al v. Clark et al*, 22 Vt., 598; *McCoy v. McCoy et al*, 36 W. Va., 772).

In partition actions, although brought for the benefit of all parties, counsel fees are not taxable as costs in the absence of special statute (*Strawn v. Strawn et al*, 46 Ill., 412; 82 Pa. St., 2329; *Keefe v. Fitzhugh*, 83 Tenn., 49).

The defendant in error, however, admitting the force of the authorities above cited, contends that they have no application to the case at bar, for the reason that a trust is involved and in such a case the fees of the plaintiff's counsel are taxed as a part of the costs.

The defendant in error has cited a large number of authorities which are claimed to authorize the charge made in this case. It is not necessary to examine them in detail, because they are capable of classification as follows:

First. Suits brought by a trustee to protect or recover a trust estate in which case the fees of counsel are charged against the estate as part of the costs.

The principle declared in this class of cases is elementary and needs no citation of authorities.

Second. Suits where one of many parties having a common interest in a trust fund at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust.

The leading case illustrating this principle is *Trustee v. Greenough*, 105 U. S., 527. In that case bonds were issued by a corporation secured by a trust fund which the trustee was wasting or misapplying and which he refused or neglected to apply to the payment of the bonds. A holder of a portion of them who in good faith filed a bill to secure a due application of the fund and succeeded in bringing it under the control of the court for the common benefit of the bondholders was held entitled to be paid from the fund before its distribution, his costs as between solicitor and client.

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Third. Suits instituted by creditors of an insolvent estate to set aside conveyances made by the debtor giving certain creditors a preference over other creditors, which suit is resisted by the preferred creditors. In such cases the counsel fees of the contesting creditors is paid out of the trust estate.

A case typical of this class is that of *Meed's Estate*, 163 Pa. St., 595. In that case the allowance was resisted on the ground that the preferred creditors had not been benefited by the action. The court answered the contention by declaring that—

“It was their (the preferred creditors) greed for more than they were entitled to under the trust that made the expenses necessary, and it seems to us under the circumstances they ought not to complain that the burden of paying them is laid on the common fund.”

Fourth. Partnership suits in which the partnership is wound up at the instance of one partner and the assets of the partnership brought into court for distribution.

A case of this character is *Olds v. Tucker*, 35 O. S., 581. It is manifest, it seems to us, that these cases do not assist the contention of defendant in error. The plaintiff in this case claimed that the property held by the defendant belonged to him, the defendant being merely a trustee. The defendant claimed that the property belonged absolutely to her. The court found neither contention to be correct but found that both the plaintiff and the defendant had an interest in it, and further found that the son also had an interest, which was not recognized by either party. The action therefore by plaintiff was to wrest from the defendant not only the property interest which belonged to him, but also that which belonged to the defendant and his son, and his contention is that he should be allowed to compel the defendant and his son to pay his counsel fees in his undertaking to deprive them of their property. We think such an allowance would be inequitable and we know of no authority which compels us to make it.

The decree should be modified by striking out of it that which makes an allowance to counsel and imposes the same

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as a charge upon the defendant and her son as well as upon the property.

Ellis G. Kinkead, M. F. Wilson and Johnson & Levy, for plaintiff in error.

Edward Colston and Simeon M. Johnson, for defendant in error.

EXEMPTION OF FUNDS USED IN ACQUIRING A HOME.

[Common Pleas Court of Franklin County.]

LYNCH V. RODEBAUGH.

Decided, April 17, 1906.

Exemptions—Husband and Wife—Earnings Used in Paying for a Home—Beyond the Reach of Creditors of the Husband, When.

Where a debtor earning \$60 a month gave \$15 a month to his wife, which she used in paying to a building association dues on a loan used in building the house in which the family reside, the money thus paid will be regarded as rent, and under the exemption laws is beyond the reach of creditors. But money previously paid by the husband, out of his earnings for the lot on which the house stands, is not exempt, and the property to the extent of such payments by him is liable for his debts.

BIGGER, J.

The plaintiff in her petition states that she obtained a judgment for \$152 before a justice of the peace against the defendant, Clinton C. Rodebaugh, and that thereafter she filed a transcript of said judgment in the office of the clerk of this court, and caused an execution to issue thereon, which was, for want of goods and chattels whereon to levy, levied on the real estate described in the petition, which real estate stands in the name of Zetta Rodebaugh, the wife of the defendant, and it is alleged that this property was purchased by the defendant, but that the title to the same was placed in the name of the wife for the purpose of hindering, delaying and defrauding the creditors of the defendant. The answer is a general denial.

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The case turns really upon a single legal question which arises upon the evidence. The testimony shows that the lot was purchased and title taken in the wife's name. Both husband and wife testified that about the sum of one hundred dollars of the purchase price of \$350 was paid from money belonging to the wife. About one hundred dollars more was paid, so they state, by the husband out of his wages, he paying the sum of ten dollars per month until that amount was paid, when a deed was executed to the wife for the lot and a mortgage given to secure the balance of the purchase price of \$150. This mortgage was made subsequent to a loan obtained from a building and loan company, which was used to build the house on the lot, which was afterwards used by the husband and wife as their home. It appears that after this house was built, the defendant paid out of his wages to his wife the sum of \$15 per month, which was applied in payment of the mortgages on the property. The legal question arising upon this state of facts is this, can a debtor give to his wife out of his monthly earnings, which the evidence shows amount to about \$50 to \$60 per month, the sum of \$15 each month, the same being applied in payment of the loan obtained to build a house, which they are using as their home, and have the property exempt from application to the payment of his debts under the exemption law of this state.

It is claimed that under the exemption law of this state, which exempts the earnings of the debtor for a period of three months, when it is made to appear that they are necessary for the support of his family, that the application of such a sum for the purpose of furnishing a residence to the family of the debtor is permissible under the exemption statute, and that whether it be given to the wife or paid to some third party who will furnish a residence, that the said sums being a reasonable allowance for that purpose is exempt, and that the property purchased therewith is also exempt.

This was expressly decided to be the law by the Circuit Court of Lucas County in the case of *Stump v. Frary*, 13th C. C., 619. Counsel for the plaintiff contend earnestly that this case is wrongly decided and is not controlling upon this question.

It is true this court is not bound to follow that decision, but after a careful examination, I am of the opinion that if the facts of this case were the same as in the *Stump v. Frary* case that it ought to be followed. I am inclined to the opinion that it is sound in principle as applied to the facts of that case. It has been decided by the courts of last resort in other states, in cases cited by counsel in their briefs, that where the earnings of a debtor are absolutely exempt for a certain period, that they may be applied as he sees fit, and that he may give them to his wife if he chooses or make any other disposition of them which he may see fit. This is true of any other property which is absolutely exempt as well as of the wages, the principle being that if they are absolutely exempt they can not be reached by his creditors, and that if he gives them away during the time that they are so exempt, that the creditors can not complain because he had a right to do as he pleased with them; that it was no fraud upon the creditors.

Now, our statute does not exempt the earnings absolutely, but they are just as absolutely exempt under the terms of the statute, whenever it is made to appear—for that is the language of the statute—when it is made to appear that they are necessary for the support of his family. Now, it would not be seriously questioned that the sum of \$15 per month would be a reasonable allowance for house rent, and creditors certainly could not well complain if the debtor used that amount of his monthly earnings in the payment of house rent. In principle, what difference can it make whether that money be paid to the wife, who out of it furnishes the home for the family, or paid to another person who does the same? If the wages were allowed to accumulate in the hands of the employer for more than three months, they would not be exempt after that period, but if \$15 of it was applied each month for house rent, would it make any difference to the creditor whether the employer retained \$15 each month to furnish a house to his employe, or whether the husband drew it and paid it to his wife for the same purpose? In each case the money is paid out for a necessity, and during the period when it is exempt for the family—

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to-wit, a house to live in. Now, the title to this property is in the wife. She bought the property according to the evidence and obtained a loan and built the house, and that she is repaying the loan out of the \$15 a month. It not easy to see upon what principle creditors can complain of this as in fraud of their right, if it be conceded, and I think it can not be successfully controverted, that each month the husband might apply the sum of \$15 for house rent as a necessity for his family under the exemption law.

Now, if in exchange for the \$15 paid each month by the husband out of his earnings, the wife had furnished a house for the family to live in, then I am of the opinion that the principle announced in the Stump-Frary case is correct, but if it goes beyond that, it is not sound law. These wages are not exempt except they be necessary for the support of the family, and during the period provided in the statute.

Now, I am compelled to reach the conclusion upon the evidence in this case, that to the extent of about two hundred dollars of the purchase price of this property, which was paid before any house was built with this money, and was paid out of the earnings of the husband, that it can not under the statute be said to have been exempt. The parties undertake to claim that about one hundred dollars of this money was the wife's money. But in doing so their story is so improbable, and it is so clearly impeached, that I am compelled to discredit their testimony upon that point. They both claim that she had a part of it deposited in the Ohio National Bank, but Mr. Kiesewetter testifies that the wife never had any money in that bank.

As to the balance of the two hundred dollars paid before the house was built, the husband admits it came out of his earnings, but how can that money be claimed to be exempt under the statute? They must of necessity pay house rent elsewhere during that time, if there was no house then built on the lot in which to reside. Certainly a man could not claim the right to have his house rent exempt and also an additional sum by way of an investment in real estate which he expected at some future time to use as a home. House rent as a necessity could

be paid but once each month. A man could not claim a right on the plea of necessity to pay rent for two houses at the same time. Now, if in this case the entire sum paid by the husband in monthly payments of \$15 had been paid to the wife, who at all times in exchange therefor had furnished a house for the family to live in, the doctrine of the Stump-Frary case would apply. But under the facts of this case I am compelled to reach the conclusion that to the extent of two hundred dollars of this sum it was not paid in exchange for the furnishing of a house to live in, but as an investment in real estate in addition to paying house rent, and that it can not be claimed to be exempt to that extent as against his creditors. As it has been used together with other money which is exempt in paying for this property, the only way that it can be reached is by setting aside the conveyance and subjecting it to the payment of the plaintiff's claim.

For these reasons the finding and decree must be in favor of the plaintiff.

T. J. Duncan and Perry A. Roach, for plaintiff.

Henderson, Livesay & Burr, for defendant.

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QUESTIONS AS TO TITLE TO LAND.

[Superior Court of Cincinnati, General Term.]

JOSEPHINE BATES v. THE WINIFREDE COAL COMPANY.*

Decided, March 25, 1906.

Title—Equitable Estate in Cestui—Power of Alienation—Successor to Lessee Attorns to Reversioner—Conveyance with Reservation of Life Estate—Not an Eviction—Lessee of Assignee a Surety—Assumpsit—Estoppel.

1. A provision that the net income from land is in any event to go to the *cestui*, with power to collect and without any discretionary control in the trustee, conveys to the *cestui* an equitable estate, which under the rule in Shelley's case is an equitable fee with the power of appointment merged in the power of alienation.
2. A successor to the title of a lessee long subsequent to the execution of the power of alienation, by entering upon the estate and paying rent to the present claimant of title for a period of years, attorned to her as the reversioner, and is estopped from denying her title.
3. A subsequent conveyance by the claimant to her daughter, with a reservation of a life estate, was not an eviction, or a breach of covenant for quiet enjoyment.
4. Assumpsit being an action of an equitable character may be employed to recover installments of rent as they become due under a contract to pay by installments.
5. A lessee from an assignee is a surety, and the lessor has his remedy against either.

HOSEA, J.; FERRIS, J., and HOFFHEIMER, J., concur.

Reserved from special term.

This is an action in the nature of assumpsit to recover installments of rent, brought against an assignee (by mesne assignments) of the original lessee, of a lease of lands for ninety-nine (99) years, renewable forever. The material facts are as follows:

(a). TITLE OF LESSEE.

1. In July, 1850, Catherine McFarland, owner in fee of the lands in question, deeded to John F. McFarland and his heirs forever upon the following trust:

*Affirmed by the Supreme Court without report, *Winifrede Coal Co. v. Bates*, 74 Ohio State, —.

"In trust nevertheless to permit and suffer her son, the said Isaac McFarland, only for his sole use and personal benefit, to draw, receive, and collect the rents, issues and profits arising therefrom, he paying the taxes and repairs, during his natural life, and to and for no other purpose whatever; and for such other uses and purposes after his death, as he by deed or last will and testament duly executed shall or may direct and declare forever; and in default thereof, for the use and benefit of his heirs at law and their heirs forever; and in trust not to permit or suffer the said premises to be diverted from the uses and purposes intended, under any circumstances whatever."

2. In October, 1876, John McFarland, trustee, together with Isaac McFarland, *cestui*, and his wife, Josephine, executed to Arthur W. Ross, his heirs, executors, administrators and assigns, for ninety-nine (99) years, renewable forever, an indenture of lease of the same lands, upon covenants for an annual rental of \$1,500 until 1878, and thereafter of eighteen hundred (\$1,800) dollars, payable in monthly installments of one hundred and fifty (\$150) dollars; lessee paying all taxes and assessments, and to keep buildings insured for two thousand (\$2,000) dollars, with covenants for forfeiture and re-entry upon ten (10) days default in rental or other covenants (Recorded in Lease Book 57, p. 68, Ham. Co. Rec.)

3. Arthur Ross dying, a decree of the probate court, *in re* estate of same, was entered, directing the conveyance, by his administrator, of all real estate shown in the inventory of partnership assets, to the surviving partners; and thereupon John A. Porter, administrator, on January 25, 1883, conveyed to Addison Lysle and George Lysle, surviving partners, their heirs and assigns, by quit-claim deed, the property in question, said deed containing the following: "all of said property herein described is now conveyed subject to the terms, agreements, conditions, and stipulations in said leases as above contained, to which reference is hereby made"; together with a specific reference to the lease and the record of the same.

4. On April 1, 1885, Addison and George Lysle entered into an agreement with the Winifrede Coal Company (the defendant here), to sell and convey several leasehold estates, including that in question, subject to all rentals and taxes to accrue there-

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after; deeds to be "warranty deeds free from incumbrance except rents and taxes to accrue," as set forth; vendors to procure assent of lessors where leases require. On the same day the Lysles, with their wives, executed a general warrantee deed of the leasehold estate in question, concluding the description as follows:

"The property described above is held by the grantors under and by virtue of a certain lease made by John McFarland, trustee, and others, to Arthur W. Ross, of date the 19th day of October, 1876, for the term of ninety-nine (99) years renewable forever; said lease recorded in book 57, page 68 of the Real Estate Records of Hamilton Co., Ohio, *and this conveyance is made subject to all the terms, stipulations, covenants and agreements of said lease, as therein contained, all of which the grantor assumes.*"

5. On June 16, 1902, the Winifrede Coal Company, by quit-claim deed, conveyed the property in question to John T. Nielsen, no reference being made to any covenants. It is admitted that Nielsen is an employe of defendant, and that no consideration was paid therefor. No rent has been paid by Nielsen, and plaintiff has refused to recognize him as a tenant.

(b). TITLE OF LESSOR.

1. Same as No. 1, *ante*.

2. In 1878, Isaac McFarland, "for the purpose of vesting the reversion in my (his) wife, to take effect upon my (his) death," quit-claimed to Henry M. Cist, who immediately quit-claimed to Josephine, wife of Isaac McFarland, both these deeds referring to the trust deed to John McFarland, and reciting that they are intended to be in effect one instrument, "being executed in pursuance of the provision in said (trust) deed authorizing Isaac McFarland by his deed to direct and declare how the property may descend after his death—the purport of which being to convey in fee simple, said conveyance to take effect on the death of Isaac McFarland."

3. In 1882, Isaac McFarland died, leaving all his property by will to his wife, Josephine; a daughter Catherine (afterward Mrs. B. M. Cox), survived.

4. In 1893, Josephine Bates, the present plaintiff, conveyed to her daughter, Mrs. B. M. Cox, in fee, reserving a life estate to herself.

The defenses presented are under three subjects of attack, namely: the status of the lease, the plaintiff's title, and the obligations of the defendant as assignee.

It is claimed that in executing the lease, in 1876, Isaac McFarland had no estate in the land, and his wife Josephine no dower; and that, consequently, their signatures to the lease conveyed nothing. Further, that the estate of the trustee, John McFarland, being measured by the life of the trust, his power to lease was limited to the life of Isaac, unless the latter had executed his power of appointment and created further uses, which is denied; and that, in consequence, the lease expired with the life of Isaac. In the same connection it was urged that the trust was, in its essential nature, a "spendthrift trust"; and that the conveyances by Isaac to his wife Josephine, were ineffectual for any purpose, because Isaac had power only to "appoint and not to convey."

But this argument proceeds upon an assumption that the rights of Isaac McFarland were those derivable under a "spendthrift trust." On the contrary, since the net income of the land was to the *cetui* at all events, with power to collect, and without any discretionary control in the trustee, the right conveyed to Isaac was an equitable estate—the trustee holding the bare legal title. *Thornton v. Stanley*, 55 O. S., 199.

It was moreover, under the rule in Shelley's case (which is still in force in Ohio, except as to devises by will), an equitable freehold estate for life with remainder to his heirs, and therefore an equitable fee, subject to the power of appointment, which is practically merged in the power of alienation. *Brockschmidt v. Archer*, 64 O. S., 502.

The rule applies to all estates of freehold, whether legal or equitable. See Preston's statement of the rule (p. 271), adopted and approved by Chancellor Kent, 4. Kent's Com., 22.

The title of the lessee under the lease made by John McFarland, Isaac McFarland and Josephine, the wife of Isaac, in 1876, was therefore complete by the merger at its inception of

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the legal and equitable titles and release of dower, vesting the perpetual use in the lessee.

The conveyance by Isaac to his wife through Cist, in 1878, if not a technically proper execution of the power of appointment, was nevertheless equivalent, in that it was a conveyance, *in futuro*, of the equitable fee; which title was confirmed by Isaac McFarland's will at his death in 1882; and this may be considered in equity as an execution of the power. *Burr v. Hatch*, 3 O., 529.

But this happened long prior to the defendant's succession to the lessee's title and possession under the lease, which occurred in 1885. By thus entering upon the estate and paying rent to plaintiff from 1885 to 1902, the defendant attorned to plaintiff as the reversioner, and is estopped to deny her title. *Washburn on Real Property*, par. 745; *Moore v. Beasley*, 3 O., 294; *Smith v. Harrison*, 42 O. S., 180; *Maxwell v. Griftner*, 11 C. C., 210.

The further claim that the subsequent conveyance by plaintiff to her daughter, subject to the lease with reservation of a life estate, was an eviction, is untenable. There was no disturbance of possession, or title of the lessee. The case of *Mathews v. Gas Co.*, cited from 179 Penn. St., 165, was where a lessee had been in default for rent for years; and the conveyance, to take effect *in praesenti*, was construed as an assertion of lessor's right to forfeit.

In the present case, the conveyance was made subject to the lease, which was duly recorded and notice to all concerned; and, the fact of occupancy and title of the tenant being known to grantee, who was bound thereby, it is not a breach of the covenant for quiet enjoyment by the tenant. *Lindley v. Dakin*, 13 Ind., 388.

It is claimed, further, that, as assignee of the lessee, the defendant was bound for the rent only during occupancy, and that, having a right to re-assign, its liability ceased when it assigned to Nielsen in 1902.

The general proposition, that the liability of a mere assignee rests upon privity of estate, and not on contract, and that privity of estate as a covenant real, binds the assignee of the term

only during his ownership and possession, is conceded. Washburn on Real Property, par. 682.

It is also true, as argued at the bar, that the statute of 32 Henry VIII., C. 34, which extended privity of contract from reversioner to reversioner, and gave the right to sue in covenant in actions by or against assignees, is not in force in Ohio.

But, nevertheless, its place is supplied by the provision of the code, authorizing suit by the real party in interest. *Masury v. Southworth*, 9 O. S., 340; *Smith v. Harrison*, 42 O. S., 180; *Hall v. Paine*, 14 O. S., 422.

The difficulties arising out of the rigidity of rules and forms of actions at law, *per se*, were the occasion for the adoption of our code of civil procedure; and the civil action of the code is designed for the application of both legal and equitable principles and relief. *Platt v. Calvin*, 50 O. S., 703. Consequently, while in a common law action such a covenant could not be enforced against an assignee, the code action for the purpose of enforcing the liability consequent upon notice, in equity, may be regarded as an equitable proceeding. Moreover, *assumpsit* is an action of an equitable character. 4 Cyc., 320; *Van Doren v. Robinson*, 16 N. J. Eq., 256; *Brewing Co. v. Holmes*, 69 L. J. Ch., 149. And can be employed to recover instalments as they become due upon a contract to pay a sum by installments. *Hamlin v. Rice*, 78 Ill., 442; *Tucker v. Randall*, 2 Mass., 283; *Fontaine v. Arresta*, 9 Fed. Cas., 4905.

In *Sutliff v. Atwood*, 15 O. S., 186, there is also contained an important exception to the general doctrine limiting the liability of assignees of lessees.

The court says (p. 196):

"The legal duty of an assignee arising from an assignment executed without covenants on his part to perform the covenants of the lessee, is limited to the time of the continuance of his interest. He is not chargeable for a breach of covenant happening after assignment, for the privity of estate is wanting. He is liable only in respect of his possession. His liability will not continue, though the assignment be made for the express purpose of getting rid of his responsibility."

The court proceeds to say further, that, in view of this very contingency, a court of equity, if called on to enforce specific

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performance of an agreement of sale of the lease, would imply an agreement of indemnity in favor of the seller, "as though the purchaser *had agreed to assume all the lessee's burdens*" in taking over the lease, and would insert such covenant in the deed of transfer. (This case has been cited with approval in many subsequent cases.) In the present case, the parties themselves applied the equity rule in a little different way, namely: the Lysles executed a warrantee deed of transfer with a covenant reading as follows:

"This conveyance is made *subject to all the terms, stipulations, covenants, and agreements of said lease, as therein contained, all of which the grantee assumes.*"

And this was assented to and confirmed by acceptance of the deed, and entering into possession of the property and complying with the covenants of the original lease, thus assumed, for seven years. The signatures to the deed containing this covenant, by the grantee, was not necessary. Acceptance and taking possession under it were sufficient to bind.

It was, in fact, a new contract, made and intended for the benefit of the successor in title of the reversioner, to whom the defendant attorned as landord; and the consideration was the warranty of title by the Lysles, which amounted to an independent covenant of seizin and enjoyment.

Thus the defendant "stepped into the lessee's shoes and assumed his obligations." *Oil Co. v. Crawford*, 55 O. S., 161 (179); *Wetzell v. Richcreek*, 53 O. S., 62 (70); *Poe v. Dixon*, 60 O. S., 124 (134).

The principle upon which contracts made by two parties for the benefit of a third, are upheld in favor of said third party, is established in the United States by an overwhelming array of authorities. 9 Cyc., 377, and cases cited.

These cases also uphold the right of the party benefited to sue in his own name; and this is especially true in the code states which require suit to be brought in the name of the real party in interest (*Id.*)

This is also settled law in Ohio—a few out of many cases being as follows: *Poe v. Dixon*, 60 O. S., 124; *Society v. Haynes*,

47 O. S., 423; *Emmett v. Brophy*, 42 O. S., 82; *Brewer v. Maurer*, 38 O. S., 543; *Burdick v. Cheadle*, 26 O. S., 393; *Thompson v. Thompson*, 4 O. S., 333.

“It was competent for the parties to introduce into the assignment any covenant or stipulation pertinent to the subject, which they may have agreed upon.” *Wetzell v. Richcreek* (*supra*).

The covenant, here, bound the defendant to perform the obligations of the lessee, among which was the obligation to pay rent during the entire term. *Taylor v. DeBus*, 31 O. S., 468 (472).

The assignment by defendants, in view of these covenants, would not discharge them in respect of their liability. The defendant here occupies the relation of lessee to his assignee, and is thereby a surety. The lessor has his remedy against either. (Washburn on Real Property, par. 683; *McHenry v. Carson*, 41 O. S., 221; *Poe v. Dixon*, *supra*).

It is therefore unnecessary to consider the character of the assignment to Nielsen, under the circumstances of this case.

In accordance with the views above expressed, we must sustain the plaintiff's contention and give judgment accordingly.

Judgment for plaintiff with costs.

C. Hammond Avery, for plaintiff in error.

Maxwell & Ramsey, contra.

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Machold v. P., C., C. & St. L. Ry. Co. et al.

BONDS IN INJUNCTION SUITS.

[Common Pleas Court of Franklin County.]

ALFRED MACHOLD V. THE P., C., C. & ST. L. RY. CO. ET AL.

Decided, February 6, 1906.

Injunction—Temporary Order Granted and Bond Given—Liability of Surety—Where the Action is Dismissed by Consent—Without Prejudice—For Failure to Prosecute.

The failure of a plaintiff to prosecute an action for an injunction, where a temporary restraining order has been granted and bond given, is a confession by him that he has no case to try, and that his interference with the rights of the defendant by injunction was without warrant, and the surety is liable, whether the action is dismissed at the request of the plaintiff, or because of his neglect to prosecute. *Krug v. Bishop*, 44 Ohio State, 221, distinguished.

DILLON, J.

The petition alleges that in a former action in this court, the defendant railway company, in an action against the plaintiff, secured a temporary injunction against him and gave a bond with its co-defendant as security, which bond in accordance with Section 5576, secured to the plaintiff there enjoined, the damages he might sustain "if it be finally decided that the injunction ought not to have been granted." The petition further alleges that about four years subsequently to the filing of the petition in the case the injunction was dismissed for want of prosecution. Damages are asked in the sum of \$1,000, alleged to have been incurred by reason of the granting of said temporary injunction.

A demurrer is interposed by the defendants, and the claim is made in support thereof that it has not yet been finally decided that the temporary injunction ought not to have been granted, and that no recovery can be had upon such a bond unless there has been a decision by the court on the merits of the case in which the action was pending. While the statutes and the wording of the required bond are practically the same in all the states, there is some conflict as to just what action of the

court is necessary in order to warrant the conclusion that it has not been "finally decided" that the injunction ought not to have been granted.

It seems well settled that where the action is subsequently dismissed by any agreement or consent of the parties, whether by compromise or otherwise, no action will lie upon the bond because the court has not in such case by any decision of its own, decided that the injunction ought not to have been granted (*Railway Company v. Burke*, 54 O. S., 98). In this last named case, the parties agreed to abide by the decision of the arbitrators after the action had been commenced, and the court applying the rule that the terms of such a bond must be strictly construed, held that the decision contemplated by the plaintiff, was a decision by the court on the merits of the case in which the action was pending; that the parties had bound themselves to stand to and abide the reward, whether right or wrong, of their own deliberate purpose, and therefore no such step such as error or appeal could be permitted, nor such other steps as the law requires in order that the decision may conform to the law. It has likewise been held in the state of New York that where an action is dismissed as a penalty upon the plaintiff for contempt of court, this does not involve the merits of the case, and will not warrant an action upon the bond, the decision of the court in such case being purely punitive and having no reference to the merits of the case, or to the plaintiff's willingness to proceed with the trial of the same (*Apollinaris Co. v. Venable*, 136 N. Y., 46). In that case the court says that the dismissal of the action and the consequent dissolution of the injunction was upon a matter having no relation to the merits, either directly or by inference, and it would therefore be contrary to the natural or reasonable interpretation of such action to hold that this dismissal was a determination by the court that the plaintiff, at the time the temporary injunction was issued, was not entitled thereto, and that such a holding would be contrary to the undertaking of the sureties.

The contention of the defendant in this case that there must be an actual decision upon the merits, I do not think is sus-

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tained by the reasoning or authorities. A temporary restraining order is granted without a full hearing and often without any hearing at all. The court relies upon the urgency of the situation as represented by the plaintiff. To assure the court and the parties affected, that the plaintiff is right and that no injustice may result by reason of the exercise of this most unusual and potent remedy, the plaintiff gives this bond to answer for any damages which the defendant may suffer, the condition of the bond being that such damages will be paid the defendant in case the court shall finally decide that said injunction ought not to have been granted. The only inquiry remaining is as to whether or not there is such a judgment rendered by the court as amounts to a judicial finding that the injunction ought not to have been granted.

Of course, the final order of the court in such cases is rarely, if ever, made in the exact language above quoted. Indeed, the final order seldom refers to the existence of the preliminary order, but is simply a finding for or against the plaintiff. It is therefore, by virtue and force of natural and logical deduction that the conclusion is reached, that the judicial finding in effect was that the injunction ought not to have been granted.

In the case of *Pugh v. White*, 78 Ky., 210, the plaintiff's petition, after injunction obtained, remained in court some five years, when the action was dismissed for failure to prosecute. The court held that the dismissal of the petition was a judicial determination that the injunction ought not to have been granted. The authorities, in discussion of the subject, receive very thorough treatment in this case.

The case of *Mitchell v. Sullivan*, 30 Kan., 231, holds directly that where the plaintiff subsequently appears in court and dismisses his action without prejudice to another action, such judgment is equivalent to a final decision by the court that the temporary injunction ought not to have been granted, and that an action lies upon the bond immediately by reason thereof. The argument of the court in that case is most potent. Any other conclusion would lead to the greatest of mischiefs and manifestly be contrary to the plain meaning, object and purposes

of the bond itself. The suggestion at once occurs, that if a party might by temporary injunction be restrained and held *in statu quo*, during the entire period the case is awaiting trial, to his great damage and injury, and then the same could be dismissed by the plaintiff on his own motion, what great injustice would be done. The defendant asks no relief; he can not prevent the plaintiff (after the expiration of sufficient time to enable the plaintiff to accomplish his purposes), from voluntarily dismissing his action either with or without prejudice. The defendant in such case would have been put to great trouble, inconvenience, damage and expense, and yet have no remedy. Despite the force of this argument, however, we are met in our own state by the case of *Krug v. Bishop*, 44 O. S., 221, in which it was held that, where such an action is dismissed without prejudice, no breach of the condition of the undertaking occurs. The court makes prominent by the use of italics that the action was dismissed without prejudice.

The case at bar may therefore be distinguished from the last named case, by the fact that the action in question here was not so dismissed.

Opposed to this decision in Ohio, is not only the recent arguments set forth in the Kansas case, but directly opposed upon the same state of facts, is the case of *Swan v. Timmons*, 81 Ind., 243, and the case of *Weaver v. Poyer*, 73 Ill., 489. In the last two named cases, the plaintiff voluntarily dismissed his case without prejudice and a new action was pending in which an injunction had been granted, but the court held that the right to a recovery on the bond accrued instantly upon the dismissal of the first case. The failure of plaintiff, therefore, to prosecute, is in law a confession by him that he has no case to try, and that his action in interfering with the rights of the defendant by injunction was without right, and it matters not whether this dismissal be at the request of the plaintiff or by the neglect of the plaintiff. The law requires and demands that the plaintiff who thus secures a temporary injunction against the defendant, shall, in the absence of settlement, make good his implied promise to the court that he has a cause of action, and that he

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is right in obtaining from the court the powerful remedy in advance of a hearing in which the defendant has not had his day.

The demurrer to the petition will therefore be overruled.

L. H. Innes, for plaintiff.

Henderson, Livesay & Burr, for defendant.

**PROSECUTION OF PHYSICIAN AS AIDER AND ABETTOR
UNDER THE BEAL LAW.**

[Common Pleas Court of Licking County.]

GEORGE W. GARRISON v. THE STATE OF OHIO.

Decided, March, 1906.

Liquor Laws—Declaration of Purchaser—Who Had Been Given a Prescription for Liquor—Incompetent against Physician. When—Activity of Mayor in Securing Evidence to Convict—Not a Disqualification for Sitting at Trial.

1. In a prosecution under the Beal law, of a physician as an aider and abettor in the sale of intoxicating liquor in a dry town, in that he gave prescriptions to parties for liquor which was purchased at the drug store, a declaration by the purchaser to the druggist as to what he wanted the liquor for, is incompetent when made in the absence of the physician.
2. The employment by a mayor of detectives to obtain testimony for use in a prosecution for liquor selling, and the payment of such detectives by the mayor for the services so rendered, does not disqualify the mayor from sitting at the trial of the case; nor is he disqualified by opinions he may entertain regarding the offense.

SEWARD, J. (orally).

The case of *George W. Garrison v. The State of Ohio* is submitted to the court upon a petition in error. There are two cases. The errors complained of are quite numerous. I believe they are the same in each of the cases.

Dr. Garrison was charged with selling intoxicating liquors in a dry town, under the Beal law; and while it is not claimed that the doctor sold the liquors directly, it is claimed that he was

guilty under Section 6804, as an aider and abettor, and therefore is a principal in the offense.

The testimony shows that the doctor gave prescriptions to parties, one in each case, for intoxicating liquors; that the parties went to the drug store and had the prescriptions filled. I believe the testimony shows that it was half a pint in each case. It is claimed that the prescriptions were not given in good faith.

The errors complained of are:

That the mayor erred in the admission of improper and incompetent evidence offered on behalf of the state of Ohio.

That the mayor erred in the exclusion of proper evidence offered by defendant below.

That the mayor erred in overruling the demurrer of defendant below to the affidavit in said case.

That the mayor erred in overruling the request of defendant below for a jury trial of said case. But the Supreme Court has passed upon that, and it is sufficiently well indicated to counsel that it is the law of the state of Ohio.

That the mayor erred in overruling the motion of defendant below for a new trial.

That the mayor was disqualified from trying said case for the reason that he had employed and paid the witnesses on whose testimony alone conviction was had.

That the judgment and sentence of said mayor is against the law of the case.

That the judgment and sentence of said mayor is against the evidence in the case and manifest weight thereof.

That there is no evidence whatever to sustain said judgment and sentence.

That the said mayor was without jurisdiction to try said case by reason of his connection with same before it was put on trial.

That the mayor was without jurisdiction to decide said case on the 19th of December, for the reason that the date of said decision was ten days from the date of the trial of said case and the submission of the same to said mayor for decision.

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That the trial of said case before said mayor was not due process of law, and contrary to law of the land.

Other errors apparent upon inspection of the record.

Now, in relation to the admission of improper evidence in this case, the court is confronted with this state of facts, as shown on page 4 of this bill of exceptions.

One of these detectives testified that he went to the doctor and got a prescription; the prescription was introduced in evidence; that afterwards, he went to the drug store—not with the doctor—the doctor was not along at all, and he gives a conversation between himself and the druggist in the absence of the doctor. Now, that certainly was clearly erroneous, to permit that kind of testimony to go to the court. There is no question about it, and there can not be any question about it, I think. A motion was made to strike it out, and the motion was overruled by the court.

Now, one of the essential points to establish in the case was the sale of this liquor; that the sale was made by the druggist, at the drug store, and the conversation is given there, and that is the only evidence that would tend to hold Dr. Garrison liable or connect him with the case. The testimony was given of the conversation between this druggist and the witness. He says: "I went to the drug store, and handed him the prescription; Mr. Reese asked me what kind I wanted, and I said I wanted the best; I never drink anything but the best; I want something to liven up on." Motion by Mr. Dougherty to rule out the conversation with Reese because Dr. Garrison was not present. Motion overruled and exceptions.

The court thinks this is clearly prejudicial error in these cases.

I do not think there was any error in the exclusion of proper evidence. I do not find that there is any error in the court overruling the demurrer. The affidavit was certainly sufficient under the statute known as the Beal law; and there was no error in overruling the demand of the defendant for a jury trial. The court having passed upon these features of the case in the Schlagel case, will not take up any time in discussing them.

As to the question of the disqualification of the mayor in this case: I think, under the statutes of Ohio, if the mayor would not try it, there could be no trial at all. There is no provision for a change of venue, and no provision for anybody sitting in his place in the statutes of Ohio, so far as the court has been able to determine. It doesn't matter what his opinions were in the matter, or what he had done before, he is not disqualified by the statutes of Ohio, so far as I am able to determine or ascertain, and counsel have not furnished the court with any authority. The testimony shows that the mayor furnished his check to pay this detective, but that would not disqualify him from sitting in the case. An affidavit of prejudice was made, but what was he to do with it? What could he do?

It is not necessary to go further in the case. The court finds that there was error in the refusal of the mayor to strike out the testimony of the detectives as to the conversation had out of the presence of the doctor, and the judgments in both cases will be reversed and remanded for a new trial.

By MR. DAUGHERTY: I want exceptions to the order remanding the cases back for new trial.

THE COURT: Very good.

By MR. DAUGHERTY: Because I claim that, by delaying eleven days to decide, the mayor lost jurisdiction of the cases entirely.

THE COURT: Intended to refer to that. While that is the case in civil cases, the court does not find any provision of the statute on that subject in criminal cases, holding that the mayor must decide a case at once. There is a provision as to civil cases, but whether that applies to criminal cases, I do not say.

G. C. Daugherty, for plaintiff in error.

P. B. Doty and *J. R. Fitzgibbon*, for defendant in error.

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DEFENSES IN ACTION FOR RECOVERY OF DEBENTURES.

[Common Pleas Court of Franklin County.]

HARRINGTON V. HALLIDAY ET AL.

Decided, April 17, 1906.

Debentures—Relation of Purchaser to Company Issuing—In Particeps Criminis—Purpose of Section 4271—Pro Tanto Defense—Statute of Limitations.

1. The provisions of Section 4271, for the recovery of money lost in lotteries, are not available to a purchaser of certificates commonly called debentures, where the purchaser becomes a member of the corporation issuing the debentures and a part owner thereof and participates in the profits.
2. An allegation that a plaintiff, suing for the recovery of money lost in the purchase of debentures, has shared in the distribution of the assets of the company by its receivers, constitutes, if proven, a *pro tanto* defense, and also states the further defensive fact that the plaintiff was a part owner of the business.
3. Such an action is barred by the statute of limitations, if not brought within one year from the time the cause accrued.

BIGGER, J.

The case is submitted to the court upon general demurrer by the plaintiff to the second, third and fourth defenses of the answer of the defendant. The action is brought by the plaintiff under the provisions of Section 271 of the Revised Statutes of Ohio, to recover the sum of \$1,116.30, alleged to have been expended by the plaintiff and paid to the defendants, and that the money was expended by the plaintiff in the purchase from defendants of certain hazards or chances, called by the defendants certificates, commonly known as debentures. Plaintiff's prayer is that she may recover the said sum, \$1,116.30, together with \$500 as exemplary damages as authorized by the said Section 4271 of the Revised Statutes.

The defendants answered jointly. The first defense is a general denial. The second defense and the first defense demurred to sets forth the organization of a company known as the Cincinnati Debenture Company under the laws of the state

of West Virginia, and the purposes of its organization and the issue to the company of a certificate by the secretary of state of this state, authorizing it to do business in Ohio. That the name of the said corporation was afterwards changed to the Ohio Debenture Company, and the location of its principal office changed from Cincinnati to Columbus. That from its organization the said company engaged in the business of selling certificates or debentures, and that it continued in such business until about the 10th day of March, 1901.

Defendants then stated that certain certificates or debentures were purchased by the plaintiff and that the plaintiff paid at the time of the purchase for each of said tickets or debentures, the sum of five dollars, as an initial membership fee for the first month and that she thereby became a member and owner of said corporation and said business; that she thereafter paid to the said corporation further sums of money in amounts and on dates unknown to the defendants, at the rate of twenty cents per month for, each ticket or certificate, until the redemption of certain certificates, and until receivers were appointed for said corporation and the business wound up by said receivers. That other like tickets or certificates were purchased by other persons from the said corporation, and that various sums of money were by them paid, from time to time, to the said corporation on account of these tickets or certificates, and that the money so paid by the plaintiff and other persons, to the said corporation on account of said tickets or certificates or debentures, was divided and apportioned among other members and holders of certificates which were selected and eligible for redemption.

The answer then states the method by which the debentures selected for redemption were determined, and that the selection of these tickets or debentures for redemption was necessarily dependent upon uncertain and indeterminate events; that plaintiff had full knowledge of each and all of these facts and of the manner in which the business was conducted; that the plaintiff as a holder of said certificates or debentures had a direct interest in said business conducted by the said corporation, and in the profits derived therefrom, and in the several

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sums of money paid by other holders of certificates to the said corporation for the purchase of said certificates; that the plaintiff was a member of the said company, and owner of an interest therein for a long time, and down to the time of the receivership and winding up of the corporation, and was a direct participant in, and part owner of the said business, and of the funds accumulated by the said company in the conduct of its business.

The demurrer raises the question, do these statements, if established by proof, constitute a defense to the cause of action stated in the petition? The statute in question, Section 4271 of the Revised Statutes, and under the provisions of which the plaintiff claims a right to recover in this action, reads as follows:

"A person who expends any money or thing of value or incurs any obligation for the purchase of or to procure any lottery or policy ticket, hazard or chance, or any interest therein, or on account of any lottery, policy, or scheme of chance, or in or on account of any game of faro, pool or combination, keno or scheme of gambling, and any person dependent in any degree for support upon, or entitled to the earnings of such person, and any citizen for the use of the person so interested, may sue for and recover from the person receiving such money, thing of value or obligation, the amount thereof, together with exemplary damages which in no case shall be less than fifty nor more than five hundred dollars, and may join as defendants in suit all persons having an interest, direct or contingent, in such lottery, policy or scheme of chance, or the possible profits thereof as backers, vendors, owners or otherwise."

The defendants under this defense seek to establish, as a fact, that the plaintiff was herself directly interested as a part owner and sharer in the profits of this lottery scheme, and that as such part owner and sharer in the profits she is not entitled to maintain an action to recover from others jointly interested with her in the illegal enterprise.

That the scheme here disclosed is a lottery is admitted by both sides, and the question has been definitely settled by the decision of the Supreme Court in the case of *The State, ex rel.*

v. *The Interstate Savings Investment Company*, 64th O. S., page 283. The language of the statute is:

"A person who accepts any money * * * or incurs any obligation for the purchase of or to procure any lottery or policy ticket, hazard or chance or any interest therein * * * may sue for and recover from the person receiving such money * * * the amount thereof," etc.

Now, the person receiving plaintiff's money, the demurrer admits, was the corporation known as the Ohio Debenture Company, an artificial person, and that the plaintiff was a part owner by virtue of her ownership of these certificates of the corporation and its business. The business being conducted by this corporation was a business contrary to public policy and the statute law of this state. It was an illegal business, both at common law and under the statute, and as such all persons concerned in such business were *in particeps criminis* and *in pari delicto*, for the law does not undertake to determine the relative degree of obliquity of those who are concerned in such illegal transactions. That being true, neither at common law nor under the statute law of this state would the courts lend their aid to any of the participants. If the plaintiff has any right of action it must be by reason of the statutory provision and that statutory provision being in contravention of the common law must be strictly construed. Upon this point Judge Scott says, in the case of *Hooker et al v. De Palos et al*, 28th O. S., at page 261:

"Such statutes are a recognition of the established rule that no recovery could be had in such cases at common law. They are exceptional in their character, are in contravention of the common law, and therefore are to be construed strictly and not extended by implication beyond the particular cases of illegality for which they provide."

The language of the statute is that such action may be brought against the person receiving money, which in this case was the corporation. It may well be questioned whether strictly construing the statute, as we must, such action could be maintained against any other person than the corporation with those who

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may be backers, vendors or sharers in the profits. But passing that, does this statute contemplate or provide for an action by one interested as a part owner in an illegal enterprise, and a sharer in the profits thereof.

After a careful consideration of the question, I have reached the conclusion that the statute will not authorize an action to be brought by one thus situated. It seems to me the plain intent and purpose of the statute is to punish the owners of the lottery scheme and to thus discourage such enterprises. That the statute was intended to permit and does permit an action to be brought against such owners by one who without having any pecuniary interest in the profits of the lottery, scheme or system itself, has purchased a ticket or chance to obtain a prize under the lottery scheme. That it was not the Legislature's intention to give this right to one who had a direct interest in the profits of the illegal enterprise, seems to me to be apparent from the provision of the statute itself, that all persons having any interest, direct or contingent, in such lottery, policy or scheme of chance or the possible profits thereof as backers, vendors, owners or otherwise may be joined as defendants. By this provision I think the Legislature plainly indicated that it was not intended to give such rights to any one of that class of persons thus authorized to be made parties defendant. The statute with its penalties is aimed at them, and not provided for their benefit. All that class is to be mulcted—not aided by the statute. I think it was the legislative intention to give such right to the players or purchasers of tickets or chances, but not to provide a right of action by one owner against co-owners. I do not believe it was in legislative contemplation that the courts should sit to hear and determine questions of contribution between those generally interested as owners and sharers in the profits of such illegal enterprises. I am, therefore, of the opinion that the averments of the second cause of action if proven will constitute a defense, and the demurrer is overruled.

The third defense in substance states that upon the winding up of the business of the Ohio Debenture Company, and the distribution of the assets of the company to the several claimants and creditors of said corporation, the plaintiff proved her claim

and received as the amount due to her by virtue of her interest in the said corporation the sum of \$272.40, and that her said claim was approved, and that she received that sum of money on account of said debentures which were sold, and issued to her by the said corporation, and upon which profits in the business in the form of dividends had been paid by said corporation to plaintiff, and that said claim was approved, allowed and received by the plaintiff, and that it was the same claim that plaintiff is now asserting in this action.

I think this would, if proven, be a defense *pro tanto* at least, and it also states the further defensive fact alleged in the first defense of her sharing in the profits of the business, and being a part owner thereof.

The fourth defense is in substance a plea of the statute of limitations, the defendants averring that the cause of action stated in the petition did not accrue to the plaintiff within one year before the bringing of this action as to all money expended by her in such debentures prior to the 11th day of January, 1901.

The demurrer raises the question as to whether or not the cause of action is barred within one year under Section 4983, or in six years under Section 4981. After a careful consideration of the decision of the Supreme Court in the case of *Cooper v. Rowley*, 29th Ohio State, 547, I think it is decisive of the question here presented, and that the one year statute of limitation applies to actions under Section 4271 of the Revised Statutes, as well as to the sections the court was construing in that case. It was the loser who sued in both cases. The court in that case held that it was an action upon a statute for a penalty or forfeiture. Judge Boynton says that this provision includes actions of debt *qui tam*, but does not say that it is limited strictly to what were known as *qui tam* action at common law, and he observes that—

“Although the plaintiff sues for himself alone, and not for himself and another, the result to defendant—the loss or forfeiture of the sum or thing won—is precisely the same. The fact that the statute confers the right to sue for and recover the whole sum lost by the wager, and awards that sum instead of a moiety or part thereof, to the party suing, does not affect the penal character of the action.”

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Nor do I see how there could be any difference in the nature of the action, whether brought by a loser within the period of six months, during which he has the exclusive right to bring it, or brought after that period when others are also given a right. He has no right to maintain such action except by virtue of the statute. But I am unable to see any difference in the nature of his right, if he begin before the expiration of the six months or after. Whenever he brings it within a year, if he be the first to bring such action, he obtains the right to recover the amount lost. "He is permitted to sue," says Judge Boynton, "not from having any legal claim to the funds in virtue of once owning it, but because he is included in the comprehensive class authorized to maintain the action."

That language is certainly as applicable to him before the expiration of the six months as afterwards. I believe the statutory limitation of one year applies to actions under this Section 4271 as well as under 4270 and 4273. For that reason the demurrer is overruled.

The same rulings apply in the case of *Alt Felix v. Halliday et al*, No. 43,368; *Trogus v. Halliday et al*, No. 43,246; *Clelland v. Halliday et al*, No. 43,300 and *Walker v. Halliday et al*, No. 43,883.

Bright & Bright, Albery, Heacock & Game, for plaintiff.

J. T. Holmes and Arnold, Morton & Irvine, for defendant.

CONVERSION BY A COURT OFFICER.

[Common Pleas Court of Defiance County.]

THE STATE OF OHIO v. WALTER R. FABIN.

Decided, June 25, 1906.

*Criminal Law—Embezzlement—History of the Statute Relating to—
Rules of Construction—Neither the Court nor its Receiver an
"Officer"—Section 6842.*

Special masters commissioners and receivers are not subject to prosecution for embezzlement in Ohio.

KILLITS, J.

Two cases with the above title are before us for consideration on demurrer to the several indictments. The indictments cover the same ground and attempt to charge the same crime, the later having been returned in an attempt to correct the former. The ground of the demurrers is that the statutes of this state defining the crime of embezzlement do not include, in their descriptions of persons subject to prosecution, officers of the court, such as master commissioners and receivers.

The defendant was indicted in four counts, the first charging that at the time of the commission of the alleged offense he was "an officer, to-wit, a special master commissioner," appointed by this court in a certain action then pending herein, describing it, and, after negating the exceptions found in Section 6842, that by virtue of his said office and employment, and while discharging the duties thereof, he received and took into his possession certain money belonging to and which should have been distributed to the certain persons named in the indictment, which he fraudulently and unlawfully embezzled and converted to his own use. The second count is identical with the first, save that the defendant is therein described as "an officer, to-wit, a receiver appointed," etc. The third and fourth counts follow the first and second in all essentials, save that the amount alleged to have been embezzled is another sum, belonging to and to have been distributed to a different person.

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It is evident that an attempt has been made to plead an offense under Section 6842, which, so far as is pertinent to the cases under consideration, and at the date of the alleged offense, reads as follows:

“An officer, attorney at law, agent, clerk, guardian, executor, administrator, trustee, assignee in insolvency, servant or employee of any person, except apprentices, etc., * * * who embezzles, etc., * * * and an officer elected or appointed to an office of public trust or profit in this state, and an agent, clerk, servant or employee of such officer, etc., * * * who embezzles, etc., * * * is guilty of embezzlement.”

Apparently the pleader conceived the defendant, as receiver or master commissioner, to be an “officer” as that term is first used in the statute; the demurrer challenges the proposition that defendant, in such capacity, came within any of the foregoing descriptions of persons capable of embezzling, and our decision must turn on the construction of this statute, and particularly of the words describing persons liable. At the outset we are met with the rule of strict construction. No person may be made subject to a criminal statute by implication, however his offense may appear to be within its reason. Only such transactions or persons are included in a criminal statute which are within both the spirit and the letter of the law, and all doubts of interpretation must be resolved in favor of the accused. *Andrew v. U. S.*, 2 Story, 202; *Hall v. State*, 20 Ohio, 7; *State v. Meyers*, 56 O. S., 340.

As a necessary corollary to this rule, it is settled that there are no common law crimes in this state, and no act, however hurtful or immoral, is punishable as a crime in Ohio, unless the same is specifically embraced within the terms of some statute. *Sutcliff v. State*, 18 Ohio, 469; *Mitchell v. State*, 42 O. S., 383; *Johnson v. State*, 66 O. S., 59.

Turning now to the section, and its legislative history, always open for profitable consideration in constructing statutes, we find that the first embezzlement statute was passed in 1839 and read as follows:

“That if any clerk or servant of any private person or of any co-partnership, except apprentices and persons within the age of

eighteen years, or if any officer, agent, clerk, or servant of any incorporated company shall embezzle," etc. (Swan, Statutes of 1841, page 239; 37 Ohio Laws, page 74.)

This law did not have the last clause relating to embezzlements by public officers, their agents and servants, and it will be noticed that the word "officer" is limited exclusively to corporations.

The law was next amended in 1864 (61 Ohio Laws, 59) by adding the words "or joint stock company" after the words "incorporated company." In other respects the law was left as it had existed for two decades. In 1869 (66 Ohio Laws, 29) it was amended by the insertion of the word "agent" after "clerk" in the first line, and by adding the clause relating to embezzlements by public officers.

In 1877 the criminal statutes of Ohio were revised (74 Ohio Laws, 240) under this title: "An act to amend, revise and consolidate the statutes relating to crimes and offenses, and to repeal certain acts therein named, to be known as title one, crimes and offenses, part four of the act to revise and consolidate the general statutes of Ohio." The first section of this act provided that the words "person" and "another," when used to designate the owner of any property the subject of an offense, should be held to include "not only natural persons, but every other owner of property." (See Section 6794.) This provision made possible a consolidation of several embezzlement statutes, and accordingly, a comprehensive law appears on page 249 of the laws of that year, as follows:

"An officer, agent, clerk, servant, or employee of any person (except apprentices, and persons under the age of eighteen years) who embezzles, etc., * * * and an officer elected or appointed (to) an office of public trust or profit in this state, and an agent, clerk, servant or employee of such officer, or of a board of such officers who embezzles," etc.

This revision and consolidation is seen to have consisted in rearranging and cutting down the number of words in the first part of the old main statute, made possible by the enlarged use of the term "person," and, by adding the words "and an agent, clerk, servant or employee of such officer, or of a board of such officers," in doing away altogether with several long sections

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relating to embezzlements by appointees in the public institutions.

It is a mandate of construction of all revised statutes, and particularly those embraced in the revision provided for by the act of 1875 (72 Ohio Laws, 87) of which this embezzlement statute, as re-enacted in 1877, is one, that the same construction which the original statute received, or would have received had its interpretation been called for, should be applied to its enactment in its revised and consolidated form, although the language may have been changed, unless it is clear that by changed language a change of substance was intended. *Allen v. Russell*, 39 O. S., 336, 337.

Applying the principle, it is plain that as to the first use of the word "officer" in the revised statute, there is no enlargement of the revised statute over the original, and that only the "officer" of a person, *i. e.*, an artificial person, such as can become and is the owner of property (Section 6794) is within its provisions. It is apparent that, applying this rule, and considering the elements out of which the revised statute was created, that the word "person" can not include the court; that where it is seen from the facts in the case, not to mean a natural person, its application is limited to incorporated or joint stock companies. Judge Thurman, in *Bloom v. Richards*, 2 Ohio State, 387, 400, says: "The law is presumed to use words in their ordinary signification, unless a contrary intention is apparent," and that principle rigidly applies in interpreting a criminal statute, where strictness is required. It would be nonsense to say that the court is a natural "person," and it would violate the rule above mentioned to say that a court is one of the artificial persons embraced in the use of this word here, not only because what were embraced within the provisions of the old statutes were clearly defined, but because of the fact that the first section of the criminal revision act (74 Ohio Laws, 241, Section 6794) limits the application of the word to such artificial persons as are the owners of property.

The court appointing Fabin receiver or master commissioner was the owner of the money he is charged with embezzling neither as a general proposition, because of the nature of the

court's relation to the matters with which it deals, nor as a fact as a private individual.

Our conclusion, therefore, as to the first part of the law, in force at the time of Fabin's alleged offenses, is that he was not then an officer as the term is there used, and that, assuming that the pleader conceived his facts to lie within that part of the statute, he was in error. That this portion of the law has been recognized by the Legislature to be too narrow in its application to meet all cases of embezzlements by persons occupying fiduciary relations touching private interests is seen in the course of legislation since 1877. In 1881 (78 Ohio Laws, 186), the words "attorney at law, guardian, executor, administrator," were added; in 1885 (82 Ohio Laws, 140), the words "assignee in insolvency" were added, and a recapitulation of all the capacities in which things of value might come into the possession of the embezzler to be within the statute was had; in 1886, bringing the statute down to the form in which it was at the time of the commission of Fabin's alleged offenses (83 Ohio Laws, 23), the word "trustee" was added; finally, in 1902 (95 Ohio Laws, 303), it was deemed necessary to make a provision covering fraternities and mutual benefit societies. We believe the court should recognize this feeling of the Legislature that the statute can not be extended beyond its strict terms.

Can it be said that Fabin came within the description contained in the second paragraph of the statute, "an officer elected or appointed to an office of public trust or profit in this state, and an agent, clerk, servant or employee of such officer?" But a moment's thought suggests that a receiver or master commissioner may not be called an officer filling a position of public trust or profit. But can he be fairly described as an agent, clerk, servant or employee of such officer? The answer of this in the negative is imperative after a brief consideration of the status of a court, and of the relation of a receiver thereto. The indictment avers that the defendant was appointed to the position by the court, as distinguished from the judge at chambers. Now a court can not be said to be an officer. Webster defines a court as being "an official assembly, legally met together for the transaction of judicial business," which needs for its lawful

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gathering a number of individual officers, judge or judges, clerk and ministerial officers, and all definitions exclude the idea that the collective body known as a court is embraced with the term "officer." 11 Cyc., 652.

Nor, if the court might be considered an officer, is a receiver appointed by it, its agent, within the authorities.

"A receiver is an indifferent person between the parties, appointed by the court to receive the issues or profits of land or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. * * * The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court." *Booth v. Clark*, 17 Howard (58 U. S.), 322.

These words do not describe either an agent, clerk, servant or employe, either of whom may bind his superior, by the performance, without special orders, of anything in the scope of his engagement which his master might do, and which are incidental thereto.

Pretty nearly this exact question, distinguished only because of a difference in the wording of the statutes, was before the Supreme Court of Kansas, in *State v. Hubbard*, 58 Kansas, 797 (39 L. R. A., 860), wherein this language is used:

"The contention of the defendant is that the relation of agency, as ordinarily understood, does not exist between a receiver and the court which appoints him or the parties for whom he acts. A majority of the court agree with this contention, and are of the opinion that a receiver is not an agent within the meaning of the statute. It is held that in construing a criminal statute, words must be given their ordinary meaning, unless it is clear that another was intended, and that to place receivers in a class with agents requires a strained and unusual construction of the statutory language."

Although the statutes under consideration differ, the argument of the Kansas court is equally applicable to the situation before us.

We are of the opinion, therefore, that the criminal laws of this state are not broad enough to embrace embezzlements by receivers or special master commissioners, and that the demurrer to

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each indictment should be sustained, with exceptions to the state.

Marshall & Fraser, for the demurrers.

D. F. Openlander, Prosecuting Attorney, and *Winn & Hay*,
for the state.

**THE LIMITATION OF LIFE INSURANCE TO LICENSED
AGENTS.**

[Common Pleas Court of Cuyahoga County.]

P. A. CONNELLY v. J. W. PICKARD, JR.

Decided, April, 1906.

Life Insurance—Prohibition against Soliciting Insurance—Unconstitutionality of the Statute Suggested—Who are Competent to Become Licensed Agents Thereunder—Contract as to Commission for Recommending Agency.

1. Where it is agreed between a life insurance agent and another that a commission shall be paid to him upon the "first installment of premium" received from one recommended to the agency by him, the contract will be construed to mean that a commission is to be paid on the first annual premium paid, where it appears that the minds of the parties met on that basis.
2. The provisions of Section 283, making it unlawful for one not duly authorized by the insurance company and licensed by the superintendent of insurance to procure, receive or forward applications for insurance in any company, are not applicable to such a contract.

BABCOCK, J.

The plaintiff brings suit against the defendant, an insurance agent, to recover a balance claimed to be owing him on an agreement to pay him a percentage of the first annual premium upon an insurance policy, for his services in recommending the insured to the defendant for the purpose of procuring life insurance.

Plaintiff is the agent of the owners of the block known as "The Society for Savings" in the city of Cleveland, and a part of his duties is looking after the offices and collecting rents from the tenants. The defendant is the agent of insurance companies not organized under the laws of but doing business in the state of Ohio, with offices in said office building.

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There is no controversy but what the defendant promised plaintiff a commission upon the first installment of premium paid by any person who should take out insurance in the office of the defendant at the recommendation of the plaintiff. But a controversy arises as to whether it was to be a percentage on the first annual premium or upon the first installment. Plaintiff recommended one to the defendant, who wrote a policy upon his life, and at the request of the insured made the premium payable quarterly instead of annually; and the contention of the defendant is, that the percentage agreed to be paid should be estimated upon the quarterly rather than the annual premium.

It is further contended by the defendant that Section 283 of the Revised Statutes makes the agreement in any event unlawful, and bars a recovery by plaintiff on the promise, whatever may have been its terms.

The court finds that the minds of the parties met on the agreement to pay a percentage on the annual premium, and that the policy would have been so written, but to accomodate the insured his payments were made payable quarterly. Finding that the understanding of the parties was that the plaintiff was to receive the commission on the annual premium, he is entitled to recover unless the provisions of this section of the Revised Statutes makes unlawful the promise so made by the defendant.

This section, among other things, provides that "it shall be unlawful for any person to procure, receive or forward applications for insurance in any company not organized under the laws of this state, or in any manner to aid in the transaction of the business of insurance with any such company, unless duly authorized by the company and licensed by the superintendent of insurance."

It is claimed that this plaintiff comes within the terms of the statute making it unlawful in any manner to aid in the transaction of insurance business, unless authorized by the insurance company and licensed by the superintendent of insurance. The plaintiff was neither authorized by the company nor licensed by the commissioner of insurance. If his service under this agreement is to be construed as in some way aiding

in the transaction of insurance business, as defined by the statute, the agreement is unlawful; otherwise, not.

Was the service he rendered such as needed to be authorized by the company, and, for doing such service, is he entitled to a license from the commissioner of insurance? I think not. To have been authorized by the company would have made him an insurance agent, so that whatever he did or said, and whatever representations the insured made to him, in the matter of taking the application would have bound the company. A person thus authorized must, under the provisions of the insurance laws of the state, take out a license and pay the required fee.

It certainly can not be successfully maintained that the statute intends that every indirect aiding and assisting an insurance business comes within the provisions of this statute. If so, the accountant or bookkeeper of the agency, the amanuensis who takes dictation and writes for the agent his letters, the office boy and the janitor who makes the fires, would have to be authorized by the company and to take out license, for they indirectly aid in the transaction of the business. The purpose of the statute is to require all agents, general agents, sub agents, and soliciting agents, to be licensed, and only such. The test is, whether the person thus aiding is acting in such a capacity that his act is the act of the company. Only such persons can receive licenses from the superintendent of insurance.

In this case it can not be successfully maintained that the plaintiff, who was simply to recommend an insurance agency, is thereby empowered to represent the company so that what he may have said or done bound the company. And it therefore follows that defendant can not avail himself of this section of the statute to avoid the promise made. The plaintiff is, therefore, entitled to recover the balance owing, which I find to be \$24.35.

It is argued that this section of the statute is unconstitutional, but having found that it has no application to the case at bar, no determination of that question is made.

G. C. Hansen, for plaintiff.

Chapman & Kramer, for defendant.

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TAXATION OF LIFE INSURANCE COMPANIES.

[Superior Court of Cincinnati, Special Term.]

RUDOLPH K. HYNICKA, TREASURER, v. THE UNION CENTRAL LIFE INSURANCE COMPANY.

Decided, August, 1906.

Taxation—Debits and Credits of Life Insurance Companies—Deferred Dividends—Reserve Fund—Bank Deposits—Contingent Obligations—What Constitutes a Debt Owed—Checks for Proposed Loans or Investments not a Debit—Uniform Taxation—Double Taxation—Tax Returns of Corporations and Individuals—Sections 2730, 2731, 3648, 3598-4, and 1094.

1. Accumulated deferred dividends or undivided profits arising on life rate endowment policies of a life insurance company are not, under the Ohio statutes of taxation, to be considered as a "legal bona fide debt owing" by the insurance company, and can not therefore be legally deducted from the company's "credits" when its return for taxation is made up.
2. Neither can the reserve fund of a life insurance company be considered a debt owing to the policy holders, in the sense that it may be deducted from the credits and thus escape taxation.
3. Bank deposits are not relieved from taxation merely because it may appear that the funds have been checked against. Nor is good faith in the issuing of the checks involved. The lien of the state attaches to the deposits on the tax day, unless it appears that prior thereto the checks were presented for payment; or that the bank by certification or otherwise irrevocably committed itself to the holder. In other words, where it appears that the money on deposit on tax day is still subject to the legal demand of the depositor it is taxable, notwithstanding the fact that there may be checks outstanding against said fund.

HOFFHEIMER, J.

This was an action brought by the treasurer of Hamilton county to recover omitted taxes. By virtue of the statutes provided in such behalf, the auditor of the county proceeded to investigate the returns of defendant company for the years 1897 to 1901, inclusive, and for the amounts found by him to be omitted he charged simple taxes. Recovery for the amounts so charged and the penalties is here sought. By agreement between

the parties a jury was waived and the cause was submitted to the court on an agreed statement of facts and also on evidence. The claim of plaintiff involves the right to subject to taxation certain large sums of money on deposit in various local banks in the city of Cincinnati, on the tax day of each of the years in question, less the gross amounts returned by the defendant.

The defendant claims such sums were in effect wiped out by the company's outstanding checks, which had been issued by it for "collateral loans and investments" and for proposed mortgage loans. As the proposed mortgage loans were entered up as completed transactions simultaneously with the issuance of its checks, and inasmuch as these mortgage loans were returned by the company as "credits," the company claims that it indirectly paid taxes on such deposits, and should not again be taxed thereon.

Still another and very important question is to be here determined. Defendant company for the years in question returned for taxation as credits sums running into millions. These "credits" were then wiped out because the "debits" deducted were far in excess of the "credits."

Examining the company's return, we find to be deducted "*re-insurance reserve fund and all outstanding obligations to policy-holders*" (Stipulation, p. 18.) This item includes (a) the reserve or re-insurance fund of the company; (b) the accumulated deferred dividends, or undivided or surplus profits of the company's *life rate endowment policies*. The auditor ascertained the amounts deducted from credits on account of "accumulated deferred dividends," arising on the policies of the character mentioned, and then he placed on the duplicate an amount of credits for taxation equal thereto. The contention therefore is, as to the right of the company to deduct from its "credits" as a "legal *bona fide* debt owing," "accumulated deferred dividends" or "undivided profits" arising out of the life rate endowment policies in question.

Addressing ourselves to a consideration of the question as to the "accumulated deferred dividends," I may say, that if it appears that the company's obligation or liability under this life rate endowment policy is *contingent*, then there was no

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"legal *bona fide* debt owing," within the purview of the tax statute, and the item was not legally deductible. In other words, the question confronting the court is this: Does the defendant company, by virtue of a policy of the character mentioned, incur an actual certain fixed liability for a certain sum of money, which sum of money, if not due, lacks only falling due to be enforceable by action? Is there an existent debt as contradistinguished from a mere liability which may or may not ripen into a debt? Does the element of time *only* prevent enforceability of the liability? If so, the obligation may be said to be absolute. *Id certum est, quod reddi certum potest.* Within the meaning of the tax law then, there would be a legal debt "owing." If, on the other hand, there is no definite certain liability due or to become due absolutely and at all events, and the liability is dependent upon a contingency—one which may only ripen on the happening of some contingency, such a liability could not be considered as a debt owing. To ascertain whether there is a debt, it was said in *People v. Arguello*, 37 Cal., 525:

"Whether a claim or demand is a debt or not, is in no respect determined by a reference to the time of payment. A sum of money which is certainly and in all events payable, is a debt, without regard to the fact whether it be payable now or at a future time. A sum of money payable on a contingency, however, is not a debt, or does not become a debt until the contingency has happened."

In order, therefore, to ascertain whether the accumulated deferred dividend was a debt, or a debt "owing" and as such, deductible, we must at the outset examine the policy (Exhibit I, Auditor's Finding.) For the policy is the basis of the company's obligation or liability. It is the company's promise to its policy holder. Now, the answer in this case admits that the policy is a contract for one year with an option to renew. If not renewed, the policy *lapses*. In the next place the policy provides that upon failure to pay any of the first three annual premiums the policy *lapses and becomes unenforceable*. After three years' premiums are paid in, the policy may still lapse and be forfeited. Then the policy holder, according to the terms of the policy, has two options: (a) he may take a paid-up policy

for a less amount than the sum named in the policy; or, (b) he may default in payment and take a paid-up non-participating policy for a specified time (one year and forty-two days). Non-participating means that the policy does not participate in the profits (see stipulation, page 21). It is evident, then, that a policy that has not run more than three years may lapse through the default of the policy holder. Certainly, then, it is contingent whether the company will ever be obliged to pay anything on such a policy. If the policy has run more than three years and the policy holder defaults, while he may exercise his option to surrender his policy and receive a paid-up policy for a less sum (according to the table on the back of the policy) it is *contingent* whether he will exercise such option. If he pays for a number of years and defaults and receives a paid-up, non-participating policy for the short period mentioned (one year and forty-two days), it is contingent whether any obligation of the company will mature or ripen, for, obviously, unless the default of the policy holder ensued during that stipulated period (one year and forty-two days) the obligation is at an end, and as to such policy, the company must pay nothing. This analysis of the policy establishes conclusively: first, that as to their life rate endowment policy less than three years old, the company's liability is *contingent*; second, that as to their life rate endowment policies over three years old, the company's liability is likewise *contingent*.

In addition to the uncertainty with regard to any ultimate ripening of the liability as thus revealed, upon still closer scrutiny we find in the policy the following clause:

"The company further agrees to pay to the insured the amount of said insurance at its office in the city of Cincinnati, Ohio, whenever the premiums paid on this policy and its equitable proportion of the company's profits combined, less its share of losses and expenses, equal the amount of the policy."

Now, suppose the policy holder never defaults, what profits is he entitled to? The promise is not to pay profits or dividends, because the profits or dividends may never equal *the face of the policy*. True, the custom or method of the company was to pass a resolution directing a distribution of the net profits to the

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various classes of policy holders (stipulation, page 14) and entering the proper credit on each life rate endowment policy, on the life rate endowment register (subsequently on abandoning the register, on the card), yet that entry did not, as contended for by defendant, represent any present liability or existent debt of the company to the particular policy holder so represented.

Counsel for the company *arguendo* contends that the aggregate sum of money credited to the policies of this class on the register or card became a definite fixed sum which the company was under obligation to pay to persons ascertainable at the time of payment. This contention, however, is not tenable. In the first place, the sum so credited certainly was not demandable by any policy holder of that class. The policy holder was in no sense a creditor as to such fund, and if he was not a creditor, there certainly could not be a debt. If defendants' argument were correct, it would suffer the company by its independent act to fix the obligation, whereas, that is fixed by the contract itself, and the contract speaks as to when the company shall pay and under what circumstances. In the event of default by the policy holder, the sum, or sums, credited would be wiped out in whole or in part, and in the event of net loss by the company, independent of any act of the policy holder, all premiums paid in would be wiped out, or at any rate *pro tanto* the net loss. While it would seem the almost uninterrupted prosperity of the company would render the latter *potentia remotissima*, nevertheless the contingency might occur. Once in the history of the company it actually did occur, and then the company, by its own act, recognized that the mere crediting of profits represented no fixed *existent* debt because net losses were deducted by it. So, that, whether "there will be profits or net losses to be deducted" is dependent on wise and successful management, on prosperous conditions generally; in short, on so many things that no rule could be laid down by which it could be said the claim on the endowment feature is bound to become due absolutely and at all events.

Somewhat analogous questions were before this court and the Supreme Court in *Amazon Insurance Company v. Cappeller*,

8 Bulletin, 248, affirmed by the Supreme Court, 38 O. S., 560. *Equitable Insurance Co. v. Gibson*, 11 Cincinnati Court Index, No. 175 (April 27, 1903), decision by R. B. Smith; affirmed in General Term, Dempsey, Ferris, S. W. Smith, JJ.

These cases, it seems to me, are decisive of the questions raised here. Section 2730, Revised Statutes, authorizes the deductions from credits of legal *bona fide* debts owing. In what way can it be said the item "accumulated deferred dividends" thus deducted, was a debt—a legal *bona fide* debt owing? In *Insurance Co. v. Capper*, *supra*, our Supreme Court gave us a definition of "a legal *bona fide* debt owing":

"Unless the context requires," said McIlvaine, J., "some other construction, surely the phrase 'legal *bona fide* debts owing by such persons' can mean nothing more than a fixed liability to pay a sum, or sums, certain, due or to become due at all events, to some other person or persons, it being understood, of course, that that is certain which can be made certain."

And in the General Term, when the same case was up for consideration, Harmon, J. (Force and Worthington, JJ., concurring, 8 Bulletin, 248), said:

"If the mere word 'debts' (in 2730) had been used, the meaning of the Legislature might not be so clear as we think it is now, though the word is one which hardly needs definition. A debt is a sum of money due by certain express agreement (2 Bl. Com., 154). 'All that is due a man under any form of obligation or promise' (Bouvier Law Dict.), or if the popular rather than the legal sense is to be taken, 'that which is due from one person to another, whether money, goods or services' (Webster's Dictionary). But the Legislature, by using the words 'legal,' '*bona fide*' and 'owing,' clearly intended to limit the word 'debts' to such actual fixed certain liabilities as if not due, lack only falling due, to be enforceable by action."

In the Capper case it was held that the item returned as "reinsurance" or "unearned premiums" (estimated amount of premiums unearned), was not a "legal *bona fide* debt, owing," within the meaning of Revised Statutes, 2730.

"What is the right of the insured, under his contract? To have indemnity in case of loss; nothing more. What is the obligation of the insurer under his contract? To indemnify the in-

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sured in case of loss; nothing more. If no loss occurs during the life of the policy, the assured takes nothing by his contract, and the insurer loses nothing. It is therefore plain that until a loss occurs the relation of creditor and debtor does not exist between the parties. It is said that a policy is a valuable thing before a loss covered by it takes place. How so? Clearly it does not add to the value of the property insured. It is not a thing valuable in its use. It is not an article valuable in trade, but it is such the holder may at any time demand its cancellation and recover the 'unearned premiums,' so-called. True, the statute secures to the holder such a privilege, but he can not exercise the privilege and hold indemnity also. The object in obtaining insurance is to secure indemnity against loss, not investment of money. Hence the right to demand cancellation until exercised is of no taxable value. After the right to demand cancellation is exercised and the right to indemnity is thereby abandoned, of course the taxable property of the assured is increased and that of the insurer diminished to the extent of the premiums returned or liable to be returned, as above shown."

True, the Cappeller case, as defendant claims, was a fire insurance case, not life insurance, but I am unable to distinguish in principle the one from the other. The contingencies under which obligations may arise are as uncertain in life as in fire insurance. True, death is certain to occur, and fire may not; but that death or fire may occur during the life of the policy is the uncertainty which makes the principle laid down in the Cappeller case analogous to life insurance also. In *The Cincinnati Equitable Insurance Company v. Gibson*, *supra*, we have a fire insurance case also. The company was a "mutual." The insured paid in a certain fixed sum of money and received insurance for seven years. At the expiration of the seven years he was permitted to withdraw his deposit, subject, however, to "losses and charges." The deposits thus held by the company were sought to be deducted as "*bona fide* debts owing," but the court held that these deposits were not debts.

"It may thus happen, said the court, that the losses and charges might consume a part, if not all, that is paid in, and can not be regarded in the language of the Supreme Court in the

Cappeller case as a fixed liability to pay a sum certain, due or to become due at all events, to some other person or persons."

So, by parity of reasoning, not only may there be no debt in the instant case, no obligation, because of the death of the policy holder, or because of a failure of the liability to ripen or accrue during the life of the policy for the reasons already suggested. but with reference to the endowment feature, *the profits and premiums may never equal the face of the policy*. The liability under the life rate endowment policy is clearly, then, *contingent*—at best a *conditional debt* only, and being so, the "accumulated deferred dividends" can not be held to be a "legal *bona fide* debt owing" within the definition of the adjudicated cases in Ohio.

The auditor, it will be observed, in investigating the returns of the defendant company, for the three years in question, ascertained the amount due from credits on account of accumulated deferred dividends on the life rate endowment policies. And thereupon he placed upon the duplicate the amount of credits for taxation equal thereto, but nothing was added on the part of the item, namely, *reserve fund or reinsurance fund*. So, that, even if it had been determined that nothing was due because of the deduction of accumulated deferred dividends, if the reserve fund was not a deductible debt, the treasurer ought still to recover under the item as deducted, because if the reserve fund had not been deducted, the company's taxable credits would have been vastly in excess of the amounts placed on the duplicate by the auditor. (For amounts see table, page 20 of stipulation.) *Detroit Fire & Marine Insurance Co. v. Hartz*, 132 Mich., 518.

The question then is, was the reserve fund a legal *bona fide* debt owing, to be deducted from the credits? The reserve fund may be said to be that part of the assets of an insurance company that the company may not by statute distribute to its stockholders in dividends. It is a fund set apart by law to safeguard the policy holder. Yet it is not the company's *obligation*, for we have seen that there may never be an obligation in the legal sense. It is practically the estimation of the probability that the insurance company may have to pay on the policies taken out. The fact that the directors are forbidden to declare divi-

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dends thereon (Rev. Stats., Section 3602), can not of itself, make it a debt due the policy holder. In *Amazon Insurance Company v. Cappeller*, *supra*, the statute (Rev. Stats., Section 3648) required a reserve fund for the payment of the policy holders, and the court held that it was not a deductible debt. And the General Term, having that same case under consideration, speaking of the reserve fund, said:

"The estimation in money of their chances of their becoming debts does not make them debts in any ordinary sense of the word, any more than the calculations upon the theory or probabilities of how many policy holders may be subjected to suffer loss or surrender their policies, changes any particular ones policy holders may forfeit their rights in the fund by failure to among them from mere policy holders into creditors. The fact remains that none of the losses insured against may ever occur, that none of the outstanding policies may ever be surrendered. So, that, the proposition that counsel for plaintiff must maintain is that the statute has used the word debts in a sense which includes the estimated probabilities of contingent liabilities becoming fixed."

Kansas Life Association v. Hill, 51 Kans., 636, is a case that seems to me to be decisive. The Kansas statute is similar to ours, except that the reserve fund must be deposited with the state treasurer. In this case it was held, substantially, that the policies were liable to lapse; that the policy holders may forfeit their rights to participate in the fund by failure to pay, that doubtless many would so fail, and that the contingent liability which was not susceptible of computation was not a debt owing in good faith, to be deducted from credits under the law. At page 649, that court said:

"The ownership of all these assets of every kind is in the company alone. It is true that it has contingent liabilities and is in a sense a trustee of the funds in its possession, but the beneficiaries of the trust are not yet determined except as to the ten thousand dollars of losses already accrued. Each and any of the pay their assessments, and many of them probably will. A contingent liability that is not susceptible of computation is not a debt owing in good faith which may be deducted from credits under the tax law, and we fail to find in any of the statutes indicating that it was the intention of the Legislature that the reserve fund of an insurance company could be exempted."

In *Kenton Insurance Company v. The City of Covington*, 86 Ky., 213, speaking of the reserve fund, the court said:

"A tax-payer, in listing his property for taxation under the equalization law can not deduct the contingent liabilities, and in this regard the same rule applies to insurance companies that applies to other tax-payers. Therefore, an insurance company, in listing its property for taxation, can not have deducted from its assets its contingent liability to policy holders for losses, or by reason of their right to claim premiums paid in the event of a cancellation of the insurance contract. In this case an insurance company is held liable for taxation upon its reserve fund or unearned premium, although as much as this fund amounts to may be required to pay losses for the year."

At page 215, the court says:

"The insurance company asserts an exemption from taxation of its reserve fund or what is termed unearned premiums on two grounds."

At page 218:

"The act of March 12, 1870, with reference to the payment of dividends requiring that no division shall be made of its reserve fund *does not divest this corporation of its right of property in it*, or to use and invest it for the benefit of the stockholders."

At page 222, the court says:

"The company is the absolute owner and should be compelled to pay the taxes. It may have to pay its entire fund in discharge of its contracts, or the whole of its capital stock; but this affords no reason for the exemption, for if such a rule is adopted as the basis for taxation in the one case, because experience has demonstrated that a certain amount of loss will be annually sustained, then the same rule must apply to all business enterprises and the assessing officer is left to speculate on the chance of loss or the probability of loss left wholly to the judgment of those conducting the business."

See, also, *Peoples Fire Insurance Company v. Parker*, 35 N. J. L., 575; *Sun Mutual Insurance Co. v. Mayor*, 8 Barber, 450, and *People, ex rel National Surety Co., v. Feitner* (Parker, J.), 166 N. Y., 129 (1901).

Counsel for defendant company, however, insists that said fund is a *debt*, not only because of the language of Section 3602, but also because of the language of Section 3598, Revised Statutes, Subdivision No. 4. This section provides that insurance companies may invest their accumulations:

"In loans upon its policies, not exceeding the reserve or present value thereof, computed according to the American Experience Table of Mortality, with interest at four per cent., *the same being the amount of debts of life insurance companies by reason of their outstanding policies in gross.*"

We have already seen that a similar argument was disposed of by the Kentucky decision already referred to, and as the argument of the able counsel for defendant company contemplates an *exemption* for the benefit of this *life insurance company*, it is well, inasmuch as exemptions find little favor with the courts, to note in passing, that this section is not found in the chapter on taxation, but the chapter relating to insurance companies, and is a provision directing what may be loaned by an insurance company on its policies. While it is true the obligations of the company on its policies are by this section called "debts," could it have been intended that they were to be considered debts within the meaning of Section 2730, Revised Statutes? The statute, it will be observed, does not denominate them "legal *bona fide* debts owing," and although the company's obligation is defined by the policy, as we have already seen, there may, in fact, never be any ultimate liability on the policy. The obligation of the company being essentially contingent, how can it be metamorphosed by any legislative declaration? As was urged by counsel for the treasurer, while the Legislature may say, that contingent obligations for the purposes of taxation should be considered fixed and legal *bona fide* debts owing, nevertheless, the obligation in its nature would still be and remain a contingent obligation. Aside from the grave doubt that the Legislature ever intended to create such an exemption, even if it did so intend to exempt an insurance company from taxation on the reserve fund, such statute would be unconstitutional, because violative of the rule requiring uniformity of taxation (Article XII, Section 2, Constitution of Ohio). It would

in effect, permit insurance companies to deduct contingent liabilities from credits, although other corporations and natural persons are deprived of the privilege. In other words, its effect would be to impose an unequal burden of taxation, favoring some corporations as against other corporations and individuals. That is prohibited also by Article XIII, Section 4 of the Constitution, which provides that the property of corporations now existing, or hereafter created, shall forever be subject to taxation, the same as the property of individuals. As was said by Harmon, J., in *Insurance Company v. Cappeller, supra*:

"Undoubtedly the rule of equality in taxation enjoined by the Constitution would be violated, if such estimates of contingent liabilities were permitted as to corporations when they are not possessed as to individuals."

See, also, *Bank v. Hines*, 3 O. S., 1; *Standard Life and Accident Ins. Co. v. Detroit*, 95 Mich., 466, and *State Bank v. Britton*, 105 U. S., 322.

The defendant's interpretation of Section 3593 would, as we have seen, render that section unconstitutional. Not so, however, the interpretation placed thereon by the court. This being so, the well-established rule of statutory interpretation must govern. "Whenever a statute is susceptible of two constructions, of which the one would make it unconstitutional, the other constitutional, the latter is to be adopted." Endlich on Interpretation of Statutes, Section 178, and cases cited.

In view of the foregoing reasons, the reserve fund must be held not to be a "legal *bona fide* debt owing," and therefore, was not deductible.

While I am cognizant of the fact that there are several cases that hold contrary views to those herein expressed, the principal ones cited, it will be found, can not be considered in point, for the reason that they turn either upon the non-forfeitable character of the policies in question (the obligation or liability thereunder being existent, or fixed), or on statutes or state constitutions essentially different from ours.

It appears from the evidence that large sums of money were on deposit to defendant's credit, in three banks of the city of Cincinnati, on the tax days in question. Certain gross amounts

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were returned by defendant company for taxation. The balance apparently to defendant's credit was reduced or wiped out, as defendant claims, and was not returned for taxation, because of an enormous amount of outstanding checks. The defendant's return was based upon its check-book, but the treasurer now seeks to tax the actual balances in bank, as shown by the books of the banks, on the day preceding the second Monday in April, in the years in question, without allowing deductions for the outstanding checks, none of which were presented or paid by the local banks until after the tax days of the respective years in question. The question whether defendant was justified in reducing amounts in bank by deducting therefrom the outstanding checks, is dependent for its answer upon two other questions: First, Were there outstanding checks as a matter of fact? Second, Assuming that there were some outstanding checks, as matter of law, were such checks properly deductible from defendant's local balances? The "checks" in question fall within *four* distinct classes, and the stipulation sets out these so-called checks by tables (see pp. 11 and 12 of the stipulation).

Table 1. This table represents checks drawn directly on the local banks. These were presented and paid after tax day.

Table 2. Checks drawn on New York banks. These checks were presented and paid after tax day.

Table 3. Checks on local banks that were never presented or paid, but canceled.

Table 4. Checks on New York banks that were never presented or paid, but canceled.

Let us first consider Tables 3 and 4. The evidence shows that these checks, as a matter of fact, never left the home office of the company. Every definition of a check assumes that it is a promise to somebody, but such pieces of paper were promises to no one. They were never delivered. On the contrary, they were canceled. The defendant, therefore, wrongfully deducted such checks from defendant's taxable deposits. The treasurer is entitled to recover the taxes on the amounts so wrongfully withdrawn from defendant's return, likewise the penalty thereon prescribed by law. I find the amounts thus wrongfully withheld from taxation are as follows:

YEAR.	OMITTED DEPOSITS.
1897	\$ 8,750
1898	269,850
1899	5,080
1900	6,270
1901	481,220

Taking up next the checks in Table 1. If we assume that these checks were actually issued by defendant company, the evidence shows that they had not been presented and paid on the tax days in question. The question then is, were defendant's funds in the local banks upon which such checks were drawn subject to the legal demand of defendant company on the tax days in question? "Money" on deposit and subject to demand is taxable. Section 2731, Revised Statutes, reads as follows:

"The term money or monies shall be held to mean and include every deposit which the person owning or holding in trust or having a beneficial interest therein is entitled to withdraw in money on demand."

The law, therefore, requires that if a person has money on deposit subject to his demand—by that is meant legal demand—he must return the same for taxation. That the money was in the banks is conceded. It is not sufficient, in order to avoid taxation on a bank deposit, to merely issue checks thereon, because a check is nothing more than an order on the fund, "payable instantly on demand." It is simply an *executory promise* to pay the sum specified in the check according to the terms thereof. The mere giving of the check, is not an assignment *pro tanto* of the fund. It follows, therefore, that until the check is presented or paid or the bank in some way committed to the holder or payee the promise may be recalled. That is to say, the drawer may countermand up to the last moment. Up to that time the funds are subject to the drawer's legal demand.

The view thus expressed is in accord with the authorities generally and is fairly deducible from *Kahn v. Walton*, 46 O. S., 195; *Covert v. Rhodes*, 48 O. S., 66; *Metropolitan Bank of Cincinnati v. The C., H. & D. Ry. Co.*, 54 O. S., 60; *Bank v. Yardly*, 165 U. S., 648; *Bank v. Browing Co.*, 50 O. S., 151.

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These checks, the evidence shows, were given for "collateral loans or expenses." But because given to pay a debt, the rule is not altered, nor is the *bona fides* of the transaction involved. A check is subject to countermand before it is presented, or the bank committed to the payee, or before the check is cashed. Now, we know the local banks were in no sense committed to the payment of these particular checks. They were not certified, nor were they presented for payment on or before the tax days in question. In *Ambach v. Sims, Treasurer*, the precise question was determined. In that case, Bigger, J., charged the jury as follows:

"Some evidence has been introduced as to certain balances in the bank to the credit of the defendant, but the defendant testified that he had given checks against these amounts. The law in such cases is that money in bank subject to be drawn out on the check of a person depositing, is taxable so long as it remains in bank subject to his order, and the giving of checks, unless they were cashed, would not exempt it from taxation."

The jury found for defendant. On error, the Circuit Court of Franklin County (Sullivan, Wilson and Summers, JJ.), reversed the judgment but sustained the above charge, and in the judgment the court said:

"The verdict and judgment below should have been in favor of the plaintiff as to the taxes upon the balances said to have been in bank subject to the check of the defendant on the dates on which the taxes upon personalty became a lien."

(The above case is unreported, but the printed record of the Supreme Court proceedings is before me).

Affirmed by Supreme Court 71 O. S. 545.

So, that, even if the checks were *bona fide* and given for outstanding obligations, it would make no difference, because debts are not deductible from bank deposits (*Payne v. Watterson*, 37 O. S., 131). The auditor, therefore, properly added monies aggregating the amounts of such checks; the deposits were in no sense reduced by such checks. The treasurer is, therefore, entitled to recover the taxes on such omitted amounts and the penalty prescribed by law. (For Table 1, see stipulation, p. 11.)

We come now to consider the checks in Table 2. There are

two reasons why the alleged outstanding checks in this class can not be held to have reduced the deposits in the local banks. First. The checks were countermandable, precisely as were the checks in Table 1. Second. The checks were not "*outstanding*," as a matter of fact. The authorities referred to (*supra*, under Class 1) apply with equal force to checks of this class, unless it should appear that there was some agreement by which the banks, after receiving the printed notice (Exhibit M) had in some way, expressly or impliedly, become irrevocably committed to their payment. Was there such an agreement? On page 8 (stipulation) we find:

"There was no agreement between the local banks of deposit and the defendant as to the mode of charging the defendant's deposit on account of these New York drafts, but the practice of the local banks of deposit was to make a book entry, charging defendant's deposit account with the draft only when it was reported paid by its New York correspondent."

It is thus apparent that there was no agreement *binding* the bank *as of the time of notice* (Exhibit M). On the contrary, the evidence shows the defendant's credit was only charged *afterwards* on payment of the New York draft by the bank. The defendant's credit, or rather its taxable funds *pro tanto* these New York checks were not charged on the tax days in question on any book of the bank, but defendant company claims that in legal contemplation, defendant's account was so charged, and that defendant, at the time of the notice (Exhibit M) lost the legal control over such funds, aggregating the amount of the New York checks, because, it is urged, the agreement of these parties (defendant and the banks) was precisely like (although it lacked the form) of a certification by the bank of the checks so drawn; that upon the filing of the printed notice (Exhibit M) and the banks forwarding letter advising payment, the banks were brought into *privity*. The contention is ingenious, but can not be sustained by the evidence or the law. If the filing of the printed notice (Exhibit M) and the issuing by the local banks of its letter to the New York banks advising payment was tantamount to certification, the evidence failed to show any state of facts by which it can be successfully main-

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tained that the bank had become irrevocably committed to the payee. If it had been expressly agreed by the local banks and defendant company that its deposits or its "credit" at the local banks were to be immediately charged with the amounts of the checks drawn at the time the banks were notified (Exhibit M) and at the time that the local banks advised the New York banks to pay, a different case might have arisen, provided, also, authority could be produced to show that a bank, by pre-arrangement with its depositor and another bank, can "certify" a check of its depositor, not on its own account, but on a bank in which the depositor has no funds; and, provided, further that it could be shown under the evidence that, after such "certification," the check came into the control of the payee, and that the payee was then and there legally entitled to present such check for payment.

Unfortunately for defendant's theory, the evidence leaves no room for legal legerdemain. The sum sought to be taxed was physically in the local banks on the tax days in question. The burden of proof was, therefore, on defendant to show that these deposits were wiped out, legally, at least, if not actually. If we were to concede, for the sake of argument, that the transaction in some way rose to the dignity of "certification," the defendant still failed to show that the banks were irrevocably committed to the particular payees of the checks on the tax days in question. The checks were not mailed or delivered to the payees on or before the said tax days. The defendant company will answer by saying that the financial agent of defendant, to whom the checks were mailed (checks for mortgage loans were never mailed to the payee directly) was, by agreement, to be also considered the agent of the proposed mortgagor or borrower or payee. The checks obviously could not be in the hands of the *drawer or his agent* and at the same time in the hands of the *payee or his agent*. If they were in the hands of the drawer or his agent, they were not "outstanding" checks. If they were in the hands of the payee or his agent, they would be outstanding checks, provided all the conditions to be complied with had been satisfied. The defendant failed to prove that the conditions (upon fulfillment of which defendant's financial agent, in his

role of agent for defendant, was to turn these checks over to himself as the agent of the payee) had been fulfilled.

The entire method of proceeding shows conclusively that the very purpose of sending these checks to defendant's financial agent (and *never* to the payee directly) was to retain control of the same until the liens on the proposed security were wiped out or the title made clear or other conditions satisfied. Certainly the financial agent, in his capacity as agent for the borrower or payee, even if he had manual possession of the checks in question, could have no greater legal right to the checks on or before the tax days (if such checks at such times were in his possession) than his principal, the payee, could have had at such particular time. In short, *the defendant has utterly failed to show that the checks were in the control of the payee's agent or in the control of the payee on the tax days in question.* It has failed to prove that the payees' agent or the payees were legally entitled to a single check on said tax days. This being so, what becomes of the claim that the local banks were in privity? What claims did the proposed payees have as against these local banks on or before the tax days in question? Were not such deposits still subject to the "latest order" of the drawer of the checks? Were not, in short, the deposits subject to the defendant's legal demand on the tax days in question?

In my judgment, these checks were in no sense different in principle from those in Class 1. They were countermandable, just as we have seen those checks were. The local banks were in no sense committed to the proposed payees at the time the tax lien attached to said funds. There was no certification nor anything equivalent to it. At the very best, the local banks, seeking to accommodate a valuable client, instead of certifying, in effect agreed to pledge their own credit to the New York banks, they guaranteeing the New York banks that, if they paid the checks thus drawn on them by defendant company, they (the local banks) would in turn pay them. But such an *external promise* to pay, if it can even be called such, did not deprive the defendant of legal control over its funds in the banks, nor could it operate to defeat the lien of the state.

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If, however, I have erred in these deductions, and it is to be held that the novel practice of these parties was in effect a certification, and had the effect of a certification, the defendant must still fail, because there was no proof that on or before the tax days in question checks were delivered to the payees or their agents and that then and there the payees were legally entitled to them. It follows, therefore, that the deposits withheld from taxation were wrongfully withheld. These monies, then, were taxable under Section 2731, Revised Statutes.

The fundamental rule forbidding *duplicate taxation* is not violated by the conclusions I have reached, although the defendant company returned as "credits" (mortgage loans) the amounts thus found to be money in bank. Simultaneously with the drawing of the checks, the defendant company, it seems, entered upon the mortgage loan register, as completed mortgage loans, the amounts thus checked out. Because the defendant company for its own purposes chose to consider the mortgage loan transaction as completed at that moment, that did not make it a closed transaction; nor could defendant company, by such action, alter the true character of the funds in bank. We have seen that the monies thus withheld from taxation were monies in bank and were subject to taxation. As bank deposits are subject to taxation, they can not be wiped out with debts, as was sought to be done in the case at bar (*Payne v. Watterson*, 37 O. S., 121). Moreover, as the debts exhausted all the "credits" returned by the company because of the wrongful deduction by it of "reinsurance reserve fund and outstanding obligations to policy holders," no tax was paid by this company either directly or indirectly on these amounts in bank. The claim, therefore, is wanting in merit either at law or equity.

I find that the total amount of bank deposits omitted in the years in question, and upon which the treasurer is entitled to recover is

1897	\$ 89,200
1898	349,500
1899	119,400
1900	60,800
1901	674,000

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I find the "credits" omitted in the years in question on which recovery should be had

1897	\$1,095,700
1898	823,200
1899	1,092,100
1900	1,254,500
1901	1,259,200

I find that the total amount of values omitted, together with the taxes thereon, to be

YEAR.	OMITTED AMOUNTS.	TAXES.
1897	\$1,184,900	\$31,028.68
1898	1,172,200	29,669.31
1899	1,211,500	31,184.01
1900	1,315,300	34,171.49
1901	1,933,200	47,982.02

In addition to which, I find that the treasurer is entitled to recover \$8,701.37, which is five per centum allowed by law by virtue of Section 1094, Revised Statutes.

In view of the foregoing, under the law and the evidence, I find for the plaintiff in the sum of \$182,728.88, and order judgment accordingly.

Alfred B. Benedict, for plaintiff.

Lawrence Maxwell and *Robert Ramsey*, for defendant.

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RECOVERY FROM A MUNICIPALITY FOR WORK DONE UNDER AN INVALID LAW.

[Common Pleas Court of Knox County.]

THE STATE OF OHIO, EX REL W. J. BERRY, v. THE CITY OF MT. VERNON ET AL.*

Decided, 1903.

Constitutional Law—Improvement of Streets—Pleading Showing Jurisdiction of Council—Delegation of Power—Estoppel—Refusal of Municipality to Levy Assessment—Remedy of Contractor—Mandamus—Application of Section 2702.

1. If the material and essential facts necessary to give council authority to proceed with a street improvement are stated in a petition involving action with reference thereto, recitals which are mere conclusions of law may be treated as surplusage and the petition allowed to stand.
2. The facts giving council jurisdiction are, filing of a petition for the improvement with a statement as to the material to be used, publication of notice, a hearing before council, and a finding that the petition was signed by the requisite number of abutting owners and that the improvement is necessary.
3. The act of April 4, 1900, relating to the improvement of streets in cities of the second class and fourth grade, is unconstitutional for lack of uniformity of operation.
4. But a petition, evidently drawn with reference to the provisions of this act, is still good against demurrer when its allegations bring it within the provisions of the general laws on that subject.
5. A contract for a street improvement which provides that the work shall be done to the satisfaction of the civil engineer and paving committee, does not exhibit such a delegation of authority as to render the contract void.
6. One who has performed work for a municipality in accordance with his contract and has not been paid therefor, has a right to a judgment at law for the contract price, and he can not resort to mandamus to compel the levying of an assessment or tax to pay his judgment until it appears that it can not be enforced by execution.

SEWARD, J. (orally).

The contention in this case is based upon a motion to make the petition more definite and certain, by requiring the relator

*Affirmed by the Supreme Court (reported),

to set out in his petition what the necessary steps were which were taken by the city council; and upon a general demurrer to the petition.

The petition alleges, in substance, that Mt. Vernon was, before the passage of the municipal code, in 1902, and at the time of the matters complained of, a municipal corporation of the second class and fourth grade; that the defendant, Charles C. Iams, president of the city council, and the other defendants, whose individual names are set out, are members of said city council; that said city, by and through its council, upon a petition signed by a majority of the owners of the feet front of abutting owners of real estate on Gambier avenue, between Main and Rogdre street, after having given due notice of the filing of the petition, found and determined that a majority of the owners of the feet front of the real estate abutting upon the proposed improvement had signed said petition for the improvement of said avenue; that the material petitioned for was proper material to be used in the improvement; that it was necessary to make the improvement asked for, and the council declared, by resolution, that it was necessary to make the improvement and assess the cost thereof, except at the intersection of streets, back upon the abutting property, and to issue bonds of the city according to law for the payment of the costs and expenses of making the improvement. The relator further avers that the plans and specifications were prepared by the city through its officers; that it advertised for bids for the work and furnishing the material according to the plans and specifications, and that said city had, by and through its council, taken all necessary steps, and had the right and authority under the laws of Ohio to accept the bid of relator, and to make and enter into a contract with him for the furnishing of the material and doing the work in making said improvement.

The relator avers that on January 8, 1902, the city, through its council, accepted his bid, and on that date made and executed a contract with him by which he was to grade and put down the pavement according to the plans and specifications on file, and that he was to do the work in a workmanlike manner, and to the satisfaction and acceptance of the civil engineer and paving

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committee. That the improvement was to remain in good condition for the period of five years from the acceptance of the same by the civil engineer and paving committee, and the city was to retain a per cent. of the contract price until the end of that period. He sets out what he was to receive for the various items constituting the completed work, and avers completion of the work according to contract and to the satisfaction and acceptance of the civil engineer and paving committee, and avers that the completed work was inspected on November 14, 1902, by the civil engineer and paving committee, and that their officers accepted the same as complying with the terms of the contract. He avers that notwithstanding the work was done to the satisfaction and acceptance of the civil engineer and paving committee, and notwithstanding they accepted the work and improvement, and recommended that the city pay for the same according to the contract, the council have failed to take any steps necessary to be taken by it; to issue and sell bonds or pay him for the same. He sets out the various items furnished, with the cost, making the aggregate amount under the contract \$28,064.24. He avers that no part of that sum has been paid him, and that the council has refused to take the necessary steps to pass the necessary ordinance for the issuing and sale of the bonds or for assessing the cost of making the improvement upon abutting real estate; and he prays that a writ of mandamus issue, requiring the council to show cause why they should not pass the ordinance providing for the assessment upon abutting property, and an ordinance for the issuing and sale of the bonds of the city, and out of the proceeds to pay him said sum of \$28,064.24.

1st. As to the motion to make more definite and certain:

The petition alleges the corporate capacity; its grade and class; the members of the council, and the president of that body; the petition of the owners of a majority of the feet front for the improvement; the giving of due notice; the finding by the council that a majority of the owners of the feet front on the street sought to be improved had signed the petition; that the material petitioned for by the petitioners was proper material; the finding that it was necessary to make the improvement asked for; the passage of a resolution declaring that it was necessary to make

to set out in his petition what the necessary steps were which were taken by the city council; and upon a general demurrer to the petition.

The petition alleges, in substance, that Mt. Vernon was, before the passage of the municipal code, in 1902, and at the time of the matters complained of, a municipal corporation of the second class and fourth grade; that the defendant, Charles C. Iams, president of the city council, and the other defendants, whose individual names are set out, are members of said city council; that said city, by and through its council, upon a petition signed by a majority of the owners of the feet front of abutting owners of real estate on Gambier avenue, between Main and Rogdre street, after having given due notice of the filing of the petition, found and determined that a majority of the owners of the feet front of the real estate abutting upon the proposed improvement had signed said petition for the improvement of said avenue; that the material petitioned for was proper material to be used in the improvement; that it was necessary to make the improvement asked for, and the council declared, by resolution, that it was necessary to make the improvement and assess the cost thereof, except at the intersection of streets, back upon the abutting property, and to issue bonds of the city according to law for the payment of the costs and expenses of making the improvement. The relator further avers that the plans and specifications were prepared by the city through its officers; that it advertised for bids for the work and furnishing the material according to the plans and specifications, and that said city had, by and through its council, taken all necessary steps, and had the right and authority under the laws of Ohio to accept the bid of relator, and to make and enter into a contract with him for the furnishing of the material and doing the work in making said improvement.

The relator avers that on January 8, 1902, the city, through its council, accepted his bid, and on that date made and executed a contract with him by which he was to grade and put down the pavement according to the plans and specifications on file, and that he was to do the work in a workmanlike manner, and to the satisfaction and acceptance of the civil engineer and paving

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committee. That the improvement was to remain in good condition for the period of five years from the acceptance of the same by the civil engineer and paving committee, and the city was to retain a per cent. of the contract price until the end of that period. He sets out what he was to receive for the various items constituting the completed work, and avers completion of the work according to contract and to the satisfaction and acceptance of the civil engineer and paving committee, and avers that the completed work was inspected on November 14, 1902, by the civil engineer and paving committee, and that their officers accepted the same as complying with the terms of the contract. He avers that notwithstanding the work was done to the satisfaction and acceptance of the civil engineer and paving committee, and notwithstanding they accepted the work and improvement, and recommended that the city pay for the same according to the contract, the council have failed to take any steps necessary to be taken by it; to issue and sell bonds or pay him for the same. He sets out the various items furnished, with the cost, making the aggregate amount under the contract \$28,064.24. He avers that no part of that sum has been paid him, and that the council has refused to take the necessary steps to pass the necessary ordinance for the issuing and sale of the bonds or for assessing the cost of making the improvement upon abutting real estate; and he prays that a writ of mandamus issue, requiring the council to show cause why they should not pass the ordinance providing for the assessment upon abutting property, and an ordinance for the issuing and sale of the bonds of the city, and out of the proceeds to pay him said sum of \$28,064.24.

1st. As to the motion to make more definite and certain:

The petition alleges the corporate capacity; its grade and class; the members of the council, and the president of that body; the petition of the owners of a majority of the feet front for the improvement; the giving of due notice; the finding by the council that a majority of the owners of the feet front on the street sought to be improved had signed the petition; that the material petitioned for by the petitioners was proper material; the finding that it was necessary to make the improvement asked for; the passage of a resolution declaring that it was necessary to make

the improvement by grading and paving the same, and assess certain portions of the cost back upon the abutting property, and to issue bonds of said city for the payment of the cost and expense of making the improvement; avers that city prepared plans and specifications. That relator's bid upon said work was the lowest bid. And then the pleader says that the city had, by and through its council, taken all the necessary steps and had the right and authority to accept the bid of relator under the laws of Ohio, and to enter into a contract for the work; and this last clause give rise to the motion.

It would be necessary to a good petition that the pleader should state the jurisdictional facts necessary to give the council authority to move or take authority in the matter. The statement that the city, through its council, had taken all the necessary steps to authorize it to enter into a contract, is clearly a statement of a conclusion of law, of an omnibus character, and not a statement of a material fact, and if there were no other facts stated by the pleader except that the city took all the necessary steps, etc., the motion should be sustained.

But if the petition states the material and essential facts necessary to clothe the council with authority to proceed in the matter, then the omnibus clause should be disregarded as surplusage, and might be liable to a motion to strike out.

A very good way to determine the matter raised by the motion would be to treat the petition as though the words indicated as conclusions of law were not in the petition—were entirely stricken out. Would the petition still be complete as to the jurisdictional facts?

The petition was evidently drawn under the provisions of the act of April 4, 1900, found in Vol. 94 O. L., 119, which provides, although it does not so appear on its face, that all cities of the second class and fourth grade are authorized and empowered to cause the streets and alleys to be improved with vitrified brick, etc., when a majority of the owners of real estate bounding and abutting on the street sought to be improved between designated points represented by the feet front, petition therefor. The petition shows that such a petition was filed.

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The second section provides that the petition shall be signed by a majority of the owners of the feet front, stating the number of the feet front owned by each petitioner, and shall state material to be used. The petition shows that it was signed by the requisite number and contained a statement of the material to be used.

Section 3 provides that when such petition is filed council shall give notice of the filing thereof, in some newspaper published and of general circulation in said city, for ten days. The petition says due notice was given; that a hearing was had; that a majority of the owners of feet front of real estate were found to have petitioned for the improvement; that it was found that the material was proper. It is provided that the council shall declare by resolution that such improvement is necessary. This, the petition alleges, was done. The court thinks the allegations of the petition as to the jurisdictional facts are ample under this statute, passed April 4, 1900, and the motion may be overruled, and exceptions.

But it is claimed that this act of April 4, 1900, is in conflict with Section 26 of Article II of the Constitution, which provides that all laws of a general nature shall have a uniform operation throughout the state. It is well known and an admitted fact that all legislation which conflicts with a constitutional provision is null and void. Now, if the subject-matter of this legislation is of a general nature, then the legislation concerning that subject-matter must be of such a character as to operate alike on all such subject-matter throughout the state. The subject-matter of streets in cities and their improvement is most certainly of a general nature, and if this act does not operate uniformly throughout the state, it is such legislation as is prohibited by Section 26 of Article II.

The act in question applies only to certain cities of a certain grade and class, to-wit, fourth grade, of second class, and the court holds the act unconstitutional and as contrary to the provisions of Section 26 of Article II. But it does not follow that the petition is necessarily bad for that reason. Should the allegations of the petition bring it within the provisions of the general laws upon that subject, it would still be impervious to a general

demurrer as far as the statutory requirements are concerned. See Section 2303.

This general demurrer admits for the purpose of the demurrer the facts well pleaded in the petition.

The defendant cites Section 2702, to support the theory that the clerk must, before an ordinance for the appropriation of money shall be passed, certify that the money is in the treasury. But the court does not think this provision of the statute applies where the cost is to be assessed back upon the abutting property.

It is also claimed that the petition is fatally defective for the reason that it does not allege that the city has accepted the improvement; that the city can not delegate the authority to so accept and approve the work as to finally bind the city and make it liable simply on the approval of the paving committee and civil engineer. The court thinks that there must be either an actual or implied acceptance or approval on the part of the city, before it could be compelled to make an assessment upon the property owners for the cost of the same.

Let us look at this contract and try and ascertain what was in contemplation of the parties to the contract in the clause referring to the approval and acceptance. Was it contemplated that it should be the final approval and acceptance, or that they should oversee the work as it progressed and approve or condemn, and notify the contractor as the work was being done, so that he could have an opportunity to correct any deficiencies as he went along, and then make their report to the city council for its approval? The latter seems to me to be the most reasonable hypothesis, and frees the transaction from being obnoxious to that part of Section 1693, which provides that the power or authority to make a contract, agreement, or obligation to bind the corporation, or to make an appropriation, shall not be delegated. If the council is bound by the approval of the civil engineer and paving committee, notwithstanding it may differ as to the obligation to accept or approve, and is bound to pay upon that approval, then the creature, *i. e.*, the engineer and paving committee, is greater than the council. If to the civil engineer and paving committee can be delegated the authority to make a final acceptance and approval, and they have so accepted and ap-

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proved, then the pleader can, under the maxim, "what one does by another, he does himself," amend and make the allegation that the city council accepted and approved.

But there is, as it seems to me, a more serious difficulty and doubt about the petition, which counsel, in argument, did not refer to, and which I will speak of later on.

I will now refer to the question of estoppel, which counsel for relator claim applies.

"A municipal corporation which has entered into a void contract can not be estopped from taking advantage of its own incapacity, when suit is brought upon such contract, or other efforts are made to secure its execution." 12 R. I., 329.

Counsel for relator claim estoppel applies in this case, even though the act of April 4, 1900, is unconstitutional, and the provisions of the general law applicable has not been strictly complied with. The demurrer could not be sustained on the finding that that act is unconstitutional alone, for the reason that the petition does not show on its face that the suit is predicated upon that act. I know that it is admitted in argument, or not seriously controverted, at least, that this is true; still, that admission, for the purpose of the demurrer, can not be read into the petition.

It is claimed by the relator that the work has been done, and that the city can not now be heard to say that it will not make the assessment or pay for the work. Counsel for relator cite 62 Ohio State, 80, as sustaining the proposition. I think the case is authority against the proposition, rather than in its favor. They also cite 59 O. S., 199. This was a suit to enjoin the collection of an assessment, to pay costs incurred in the proceeding to establish or widen a road, under a special act of the Legislature, which was declared unconstitutional. This case shows that the plaintiff petitioned for the passage of the act; petitioned for the improvement; appealed to the probate court, and was actually instrumental in making the costs which were the basis of the assessment. The court say, at bottom of page 211:

"The costs having been incurred upon proceedings invoked by them, they are now estopped from defeating an assessment upon lands for their payment."

They also cite 44 Ohio State, 595. This was a suit brought to restrain the collection of a tax levied upon property for school purposes. A joint school district had been created under an unconstitutional act of the Legislature. The plaintiffs had availed themselves of the benefits of the schools for thirteen years, and the court holds it is too late for them to interfere by injunction against the payment of the tax.

39 Ohio State, 281: Council of the city of Columbus passed an ordinance for the improvement of High street upon a petition by property owners, who actively participated in the steps leading up to the improvement, under an unconstitutional act—*Held*: Could not enjoin assessment.

"2. The act of March 30, 1875, under which the improvement of North High street was made, having been declared unconstitutional (*State, ex rel, v. Mitchell*, 31 Ohio St., 592), such of the property owners as petitioned for the privileges of the act, acted as officers of election or commissioners of the improvement, voted at the election for commissioners, or actively participated in causing the improvement to be made, are estopped from asserting such unconstitutionality.

"3. A petitioner for the privileges of the statute will be estopped to deny the power under it of the city to grant his petition; but the mere fact of the petitioning will not estop him from objecting that the subsequent proceedings of the city have been conducted in violation of the requirements of the statute.

"4. Such petitioner has the right to assume the performance of its duty by the city council, which was, before acting upon the petition by ordering the improvement, to ascertain whether a sufficient number had signed to confer jurisdiction.

"5. Active participation in causing the improvement to be made will estop the party engaged therein from denying the validity of the assessment, but to create an estoppel from silence, merely, it must be shown that the owner had knowledge: (1) That the improvement was being made; (2) That it was intended to assess the cost thereof, or some part of it, upon his property; (3) That the infirmity or defect in the proceedings existed which he is to be estopped from asserting; and, (4) It must appear that some special benefit accrued to his property from such improvement which it is inequitable, under the circumstances, that he should enjoy without compensation."

In the 31st Ohio State, 592, it is held that notwithstanding the unconstitutionality of the act, where an abutting property owner

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has caused a street to be improved, under the act, and bonds of the city to be negotiated to pay for the improvement, all who participated in causing the improvement to be made are estopped from denying the validity of the assessment made to pay such bonds. Bonds in this case were issued and negotiated to raise funds to complete the work. Here the city is relator, and seeks to make the commissioners assess cost on abutting property.

“Under these circumstances,” says the court, “we are of opinion that the defendants and those who have participated with them in causing the improvement to be made, are estopped from denying the validity of the assessment. Having voluntarily availed themselves of the provisions of the act, to create an indebtedness for the benefit of their property, good faith requires that they should be thus estopped.”

Counsel for the defendant cite 58 Ohio State, 558, a suit by Miller to recover balance due for sewer and catch-basins put in at intersections of certain streets. Miller had contracted with city for work; was engaged in completing it when instructed by civil engineer and committee on drainage to make a change at a cost of \$200. The court say, at page 575:

“The corporation should not be estopped by the acts of its officers to set up these statutes in defense of contracts made in disregard of them. It would be idle to enact those statutes, and afterward permit their practical abrogation by neglect or other misconduct of the officers of the municipality. If such effects should be given to such acts of municipal officers it would defeat the operation of the statutes. The strict enforcement of these provisions may occasionally cause instances of injustice; it is possible that municipal bodies may secure benefits under a contract thus declared void and refuse to make satisfaction. In the nature of things, however, these instances will be rare. Those who deal with public agencies entrusted with the management of municipal affairs usually experience liberal treatment.”

In 54 Ohio State, 439, plaintiffs brought suit for paving and grading Livingstone avenue, at a cost of \$8,563.52. Common pleas court held for plaintiff. Terms of contract were: That city was not to be liable until after plaintiffs had exhausted the assessment against abutting property. After completion of contract, some, if not all of them who petitioned for the improve-

ment, brought suit to enjoin assessment. Circuit court found assessment irregular, and apportioned the actual cost and expenses against abutting property, under Section 2289. Council failed to publish for bids for the required time; assessment held irregular.

“The owners of the abutting property were relieved of any obligation to pay the contractors, plaintiffs in error, any sums excepting the actual cost of the improvement, because of the omission of the city council to cause notice to bidders to be advertised according to the requirements of Section 2303, Revised Statutes. That section requires such notice to be published for four weeks in two newspapers published, and of general circulation, in the city, where the estimated cost of the improvement exceeds five thousand dollars. The estimated cost of the improvements in this cause exceeded that sum. A notice calling for bids was published, but the mode or length of time does not definitely appear, the record merely showing that it was for less than the statutory period. The duty of publication belongs to the city council. In omitting to make it in the manner prescribed by the statute, the city council violated that duty. Who is to suffer for this default? Ordinarily a principal is answerable for a default of his agent in the line of the agent's duty. If, however, that general principle should be invoked as the sole arbiter of the question, much difficulty might arise in its application. Doubtless the council of a municipal corporation is generally its agent, but that the Legislature might impose duties upon that body other than those pertaining to the entire municipality, is conceivable,” etc.

Page 452: “There are no equitable considerations that require the whole body of the tax-payers of the city to contribute to a fund to pay the plaintiffs in error. The latter, as we have seen, have been reimbursed for their expenditures made in behalf of the improvements. They are now seeking the profits of the transaction, which, if paid by the city, must be from funds raised chiefly by those who were not appreciably benefitted by the work done and materials furnished. The plaintiffs in error, therefore, must recover, if at all, not upon any equitable grounds, but upon a strict legal right. We think there is no hardship in requiring them, and all other parties who undertake to deal with a municipal body in respect of public improvements, to investigate the subject and ascertain at their peril whether the preliminary steps leading up to contract and prescribed by statute, have been taken. No high degree of vigilance is required of

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persons thus situated to learn the facts. They are dealing with public agencies whose powers are defined by law, and whose acts are public transactions, and they should be charged with knowledge of both. If the preliminary steps necessary to legalize a contract have not been taken, they can withdraw from the transaction altogether, or delay until the steps are taken," etc.

In the 65 Ohio State, page 219, *The City of Wellston v. Morgan*, Morgan sued the city for gas for three years. On page 228, the court say:

"There has been no common-law-implied municipal liability in this state since the passage of the act of April 8, 1876, amending Section 97 of the municipal code (73 O. L., 125), and carried into the Revised Statutes as Section 1693, because that section conflicts with the common law as to such liability; and whenever a statute is in conflict with a rule of the common law, or of equity, the statute must prevail. Before the passage of that act there were holdings by this court which seemed to recognize implied municipal liability, notably, *Cincinnati v. Cameron*, 33 Ohio St., 336; and since that time, there have been some expressions in opinions which seemed to recognize the same implied liability, but in none of those later cases were the provisions of the statute invoked by counsel or considered by the court, and in the late cases of *McCloud v. Columbus*, 54 Ohio State, 439; *City of Lancaster v. Miller*, 58 Ohio St., 558; *Buchanan Bridge Co. v. Campbell*, 60 Ohio St., 406, and *Comstock v. Nelsonville*, 61 Ohio St., 228, full force has been given to the restrictive statutes of the state, and implied liability denied, and the doctrine established that public officers can incur obligations against those for whom they act, only in pursuance of the provisions of the statutes, and they can not deal upon the *quantum meruit*, or reasonable value plan. With these holdings we are content."

But the most serious objection to the petition, as the court views it, is as to whether the petition does not show on its face that the relator has a plain and adequate remedy in the ordinary course of the law. Section 6744, R. S., provides that the writ shall not issue if he has. The relator alleges that the city entered into a contract with him for making the improvement. That he has completed the work according to the contract, and that he has not been paid. Now, if these facts are true, has he

not a right to a judgment at law against the city for the contract price? He is not interested in the question of the assessment. He did not agree to wait until the assessment is made or collected for his pay, or until the bonds are sold. The city agreed to pay him when the work was completed, excepting 7 1-3 per cent., which was to be paid him at the end of five years, under certain stipulations.

Mandamus will not lie where there is a plain and adequate remedy at law, or in equity. 42 O. S., 30; High Extraordinary Legal Remedies, Section 393 (Note 1, on page 278); 61 Ohio St., 628, 630; High, Section 313.

The relator can bring his action against the city; recover his judgment, and if he can not enforce it by execution, can then resort to mandamus to compel the levying of a tax or assessment to pay the judgment.

Waight & Moore, for plaintiff.

B. B. Graham and F. V. Owen, for defendant.

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JOINT USE OF MUNICIPAL POLES.

[Common Pleas Court of Franklin County.]

THE CITY OF COLUMBUS, ETC., v. THE COLUMBUS PUBLIC SERVICE
COMPANY ET AL.

Decided, March 13, 1906.

Municipal Corporations—Without Power to Permit Joint Use of City Poles for Electric Wires—Are Such Poles Personal Property?—Power of Municipality to Sell or to License Use of Personal Property—Jurisdiction of Board of Public Service over Poles.

1. The right by a public lighting company to maintain its wires on municipal poles can not be acquired by estoppel, where the company claiming such right has been charged from the beginning with full knowledge that whatever rights it might acquire to the use of such poles must be through strict legal contract with the municipality.
2. There is an entire absence of express power, either in the municipal code or previous statutory provisions, whereby a municipality may grant to a lighting company the right to jointly use municipal poles; nor can such power be implied from authority to sell either real or personal property; and to treat such pole rights as a mere license might easily result in confiscation to a degree which would exclude the city from larger use demanded by future growth.
3. The fact that public policy and good business judgment favor an advantageous contract for the joint use of city poles, furnishes no warrant to a court to assist in a continuance of such use, where the entering into such a contract is manifestly *ultra vires* on the part of the municipality.

DILLON, J.

This action is brought against the Columbus Public Service Company, a corporation organized for the purpose of furnishing electric light and water heating to patrons in the city, and also against the board of public service of the city. The object is to enjoin the use by the said electric light company of certain of the city's poles on which they have strung their wires, and also asks for a mandatory order of the court to compel the removal of such contacts as have already been made. The answers plead the provisions in two of the franchises of the defendant light company authorizing such use; also a contract made by

said light company with the board of public service granting such right and privilege; further actions and conduct on the part of the city with the light company amounting in law to an estoppel, and other considerations of policy, economy and necessity.

The discussion of the court of this case will be as brief as possible, and will especially omit discussion of those fundamental and well settled propositions of law with which it assumes all counsel in this case to be familiar, as well as to the authorities; therefore all such propositions will be omitted.

The facts establish that about the time the first franchise was granted to the predecessor of the present public service company, to-wit, on July 17, 1902, the city itself had, in embryotic stage of development the establishment of a municipal light plant, which has since been perfected and is constantly growing and in full operation. In that original franchise, and as a part thereof, is was provided "that where said city has erected poles in advance of those to be erected by said company, such poles may be used jointly by the city and said company under reasonable regulations to be adopted by the board of public works of said city." By another ordinance granted to a predecessor of the defendant light company, passed August 3, 1903, it was also provided in substance that where the city had already erected poles, such poles might be used jointly by the city and said company under a reasonable contract to be entered into by the board of public service of said city and said company.

No contract of any kind was ever made between the city of Columbus and the said light company until August 9, 1905, which will be referred to later. In the meantime the light company from time to time, as their business developed, continued to make contacts with the city's poles in various parts of the city, and on May 17, 1904, the board of public service unanimously adopted a resolution that the said Public Service Company (herein referred to always as light company) be notified to remove their wires from the city's poles and place them so as not to interfere with the city's wires, and to follow out the instructions of Superintendent Wilcox of the municipal light plant. On the same day a letter was mailed to the light company notifying it of this resolution and asking that there would be no

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delay in complying therewith. Later, on June 4, 1904, the board passed another resolution, reciting that the said light company be and is hereby required to pay for the use of the city's poles already had, and to remove these wires from the poles at once, "as they were strung thereon without the knowledge and consent of this board, except a few poles on Fifth avenue."

On the same day a copy of this resolution was likewise served upon the light company. On June 6, 1904, the light company answered expressing some surprise to receive a notice of this character, and reciting the fact that Mr. Pond, one of the members of the board, had called the writer up over the telephone and requested him to call at the board's office in relation to the use of the city's poles. This letter further recites the franchise under which they were operating, and their expectation to make an agreement by reason of certain verbal conversations previously had with individual members of the board, and reciting further a letter written February 27th, in which the light company had made the proposition that it would furnish the cross-arms and pay the expense of putting them on the city's poles and pay the city fifteen cents per contact each year for all wires strung on the poles. Three days later the light company sent a further communication to the board, saying: "We desire to enter into an arrangement with your board for the joint use of poles. * * * We would be willing to pay fifteen cents per contact, the city paying this company the same. Such contract to be drawn in accordance with and subject to the provisions contained in ordinance granting this company its franchise."

Two months prior to this last letter, to-wit, on April 27, 1904, the city solicitor had rendered a written opinion to the board of public service in which he says that "under no circumstances can you legally lease the city's poles until those poles are erected," and further, "that your board can neither lease the company's poles for the city, nor lease the city's poles to the company, except with the permission and under the direction of council." Said solicitor further stated that he would permit no further contracts. On June 11, 1904, the city solicitor sent a copy of this letter to the public service company informing it that it was the policy of the city that its poles must not be used by private lighting companies except in strict compliance

with the law, and informing the said light company that an action of injunction would be begun unless it would agree to forthwith remove its wires and no longer attempt to use the city's poles.

This communication was answered on June 13, 1904, in which the light company agrees with the statement that the city's poles must not be used by private lighting companies except in strict compliance of law, but claiming that their use is not without a warrant of law, and expressing a willingness to comply with the request not to string wires on any additional poles "until and unless a legal contract shall be entered into by and between this company and the board of public service, and in the event that such contract can not be entered into within a reasonable time, this company will then proceed to erect its own poles and at once remove its wires thereto."

On August 29, 1904, the board of public service adopted a resolution "that all wire-using companies having wires attached on city poles without a contract or consent of the city, be notified to remove said wires by September 15, 1904." Said resolution further provided that after such date the superintendent of the municipal plant was authorized to employ the necessary help and remove the wires. A copy of this resolution was, on the same day, sent to the defendant light company. To this communication the defendant light company, on October 14th, sent a letter. After reciting some of the history of the case, stated that they would as soon as possible, erect such poles as may be necessary to meet the requirements, and until that time it agreed to pay the city the sum of fifteen cents per contact. On May 31, 1905, the situation remaining practically unchanged, the board passed a resolution giving the defendant light company seventy-two hours from the date of the passage of the resolution, to render a statement as to what contacts they already had, and to state whether or not they would within thirty days remove all their wires, and further stating that in the event that such assurance was not given, or, if the assurance being given and it was not carried out, then at the conclusion of thirty days would, without further notice, remove the said wires from the city's poles. This resolution was also served upon said defendant light company.

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In reply to this the light company, by letter, said that by reason of the absence of one of their officers they would not be able to give the information within seventy-two hours, but if the time be extended until Wednesday of next week, they would be pleased to furnish the desired information. On June 7th, this information came in the shape of a letter in which, after reciting that they had occupied the city poles under a tentative and favorable agreement with the present board of public service, goes on to state that if the board desired these wires removed, it would require some time for the defendant company to erect new poles, and they asked that the board give it a reasonable time for the reconstruction of its lines, and agreeing that in the meantime they would pay fifteen cents per contact. Attached to this letter was a copy of the contracts, showing five hundred and ninety-six contacts at various points in the city. On August 9, 1905, the board of public service adopted a resolution reciting their many reasons for so doing, including good business policy and being for the best interests of the city, and whereby all former resolutions were rescinded, and it was resolved that this board enter into a contract with the defendant light company providing for the joint occupancy of the poles at fifteen cents per contact per year.

Some further evidence has been adduced by the secretary of the defendant company, by Mr. Pond, one of the former members of the board, by Mr. Rubrecht, a former member of the city law department, tending to show knowledge or acquiescence of the contacts which were being made, and also testimony by Mr. Butler, former city solicitor, and Mr. Immel, former director of the board of public improvements and now a member of the board of public service, denying any such favorable agreement.

From all the evidence adduced the conclusion is irresistible that so far as the claim is made that the right to maintain these pole contacts has been established and perfected, or acquired by estoppel, no such state of facts exists as will sustain it. The defendant light company was not only from the beginning charged with notice and knowledge of the law, but as a matter of fact, it has not been misled to its disadvantage or prejudice. Whatever acts it may have done were done with full knowledge

of the risk which it ran and with full, actual knowledge and in full constructive notice that whatever rights it might acquire upon the city poles must come through strict legal contract. Whatever verbal conversations may have been had from time to time, and they are quite uncertain and indefinite in character, it recognized to the very last the fact that it must either acquire a legal right by contract with the city or remove its wires. I do not think counsel expect any further discussion upon this point, and it has not been forcibly urged in the briefs.

The second consideration set forth in the pleadings and also attempted to be given in the evidence, but rejected by the court, pertained to the good policy of the opposed contract. It was sought to be shown that the presence of two poles on a street where one pole would be sufficient, was a great disadvantage to the public and to the city, both practically and from an artistic standpoint. Of this fact there can be no question whatever, and this court is not prepared to state that it might not be mutually advantageous, both from a financial standpoint to the city as well as to the public generally to have such a contract entered into. It must, however, be conceded by counsel that the exercise of a power by a municipality can not be increased or diminished by consideration on the part of the court as to the feasibility, desirability, profit, advantage and good policy thereof. The exercise of discretion lies with those officials of the city charged with that duty, and if the power to exercise that discretion does not exist it can not be aided by a consideration of the advantages which might accrue therefrom. Therefore, these considerations can not assist the defendant light company as to the exercise of this right.

The remaining question is as to whether or not the proposed contract which the board of public service is about to enter into, is lawful. This proposed contract, as shown by the resolution quoted above, was entered into after the original petition in this case was filed, and it was rightfully assumed by the defendant company that up to that point no right did exist. The issue upon this contract is therefore brought before this court by a supplemental petition. The claim of the city in regard to this contract is that it is based upon two propositions: First, that the proposed grant or contract is *ultra vires* as to the corporation; sec-

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ond, that even if that be one of its corporate powers, compliance with the mandatory requirements of the statute has not been made. As to the question of power in the municipality, I confess that I have not been able to find among the enumerated powers granted to the municipality, either prior to or subsequent to October 22, 1902 (the date of the passage of the present municipal code), any statute giving express authority, nor do I find the power to be necessarily implied from any other express powers which are given. The power granted to the municipality at the time the first franchise in this case was given is found in the Bates' Statutes of 1902, digested as Section 3471-3, and cognate sections under chapter four of title two.

The express power not being given to the municipalities to grant away its pole rights or any private company desiring to use the poles, the question, therefore, remains as to whether or not it is one of the implied powers of the city. The power having been given to the city of Columbus to grant such a franchise permitting electric light companies to occupy its streets, alleys, bridges, etc., to regulate the terms and conditions thereof, the inquiry arises as to whether or not, as one of the powers necessary to be exercised in carrying out the express power thus granted, is embraced in the right to permit a contract for the joint use of poles for that purpose by the city and the said company. In the first place, it must be conceded that the proposition is not usual and certainly not necessary, however much it might be commended. In granting this privilege to a municipal light company the corporation is in fact disposing of a valuable asset of the city. Discuss it as we may, it must be conceded that this is a personal right and privilege having a high pecuniary value. It is not mentioned as one of the things which the city may embrace in its granting of franchises generally for this purpose. It is clear from the evidence here that the right would have to be a very limited one, since the city has but one extra arm left upon its poles for such use in the future and has not developed its plant yet to its full capacity. It is more evident that the poles are totally insufficient for the uses which the city already sees ahead of it. It would seem, therefore, that since this is not one of those rights which the city must exercise as being necessarily or clearly implied in the exercise of a power expressly

granted, it is, as claimed by counsel for the city, an act *ultra vires*.

But, passing to the second proposition; that is to say, assuming this to be one of the powers which the city may exercise, how shall it be done? What safeguards and limitations have been put upon the city in thus disposing of its property? What legal requisites are necessary in order to accomplish such a proposition? It must be remembered that the provisions of this franchise merely contemplate in the one instance that such poles might be used jointly "under reasonable regulations *to be* adopted by the city," and in the other case, under a reasonable contract *to be* entered into. In accepting this franchise, therefore, the defendant light company knew that it had a further step to take before it would have such a right, and that was to make a reasonable contract with the city, and this means, of course, a contract made according to law. With the contention that these provisions in the franchises were material inducements to the acceptance of the same by the light company, and to this expenditure of money under it, I can see that the reading of the entire franchise relegates these provisions to a very small and unimportant sphere. I believe that it is shown by the evidence, indeed, that the value of all these contracts as proposed to be contracted for would only net ninety dollars a year, and a reading of the franchises in full show that the main purposes so overshadow this one provision, even though it be held illegal, that it could not be claimed that it was one of the material inducements. Indeed, the regulations in the franchises as to poles show that the defendant light company must have contemplated that this provision was purely tentative and might not be entered into at all. Moreover, it is not compulsory upon the city to enter into such a contract, and if the city could not agree as to what was a reasonable regulation, the contract or provision would doubtless fail for uncertainty and lack of remedy, or indefiniteness, since the court would not substitute its discretion for that of the officers of the city as to what would be a satisfactory and reasonable regulation.

To make the proposed contract, authority must be gathered from the code, and seems to be regulated under Sections 23 to 27 thereof. It is provided by Section 23 that a municipal cor-

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poration shall have the power to sell or lease real estate which was not needed for municipal purpose, and the same provision expressly limits the *jus disponendi* of personal property to a *sale* thereof, no provision whatever being made whereby personal property of the corporation which is not needed for a municipal purpose can be sold, except as therein provided. From the evidence before this court, assuming that this court might pass upon the feature, it is quite evident that the municipality has need of this very personal property, but that being a matter which is probably within the discretion of the city, there is the question before this court as to whether or not this proposed privilege and right is personal property.

The right and privilege to use the city's poles by making a contact therewith by means of wires must come under one or the other head of real or personal property. A pole is not a street or part thereof, or a means of travel and communication, as that expression is used with reference to the use of streets. It is not one of the original purposes for which streets were laid out and dedicated, as has been held by our own Supreme Court. If it be a mere license to make a contact with the city's poles, as is contended, we would have the strange result logically following that the exercise of a mere license could easily result in the complete confiscation and use of the entire property itself. If the pole had room for thirty contacts, and these thirty contacts were given to the defendant light company, the city has totally lost from itself a piece of personal property which was erected at a cost to itself and having value. The term "personal property" is very broad, and if we grant, as it seems to me we must, that these poles are personal property, the use thereof is a granting of such property by the corporation, and this, it seems to me, follows as conclusively as if it should decide to attempt to lease one of its ladders or one of its horses. The theory of the statute is that the city shall not enter into any such business; that if it has no use for any such personal property its duty is to sell it. To permit any other theory would permit the city to carry on such leasing business indefinitely.

It is provided by Section 25 of said code, that any personal property not needed for municipal purposes may be sold by the board or officer having supervision of the same. No attempt

to sell has been made or is threatened in this case, and, therefore, discussion as to this section and as to the value of the property involved, and as to whether or not it must be advertised, need not be made. The distinguishment, therefore, between the use of the city's poles and the use of streets must, as I see this case, be the same as the leasing of personal property and the use of streets.

A number of minor points have arisen in the case and I do not think it is necessary to discuss the point that no injury can come to the city through the joint use of the poles. On the contract I am content to say that circumstances might very often arise when the city and public generally would be greatly benefited, and that may be true in this case. Nor is this a question as to whether or not property owners might complain of the joint use of poles. The board of public service certainly has jurisdiction and power over the use of its own poles, and certainly has power to contract for all such purposes and uses which are necessary for it to carry out the express power granted it in maintaining this municipal light plant, but in so doing I can not concede the doctrine to be that they may at the same time dispose of its own personal property, which involves an entirely different question, even though in thus disposing of its personal property some advantage incidentally accrues to it in the exercise of its express power. Nor is this proposed contract a sale. If it were, the title would absolutely pass from the city. If the city, through its officers, should attempt to sell outright a part of its personal property, a question might be presented here, which, in this case, need not be discussed, but, concluding as I have, that the board of public service has attempted to enter into a contract to lease a portion of its personal property, the statutes (Sections 23, 24 and 25) apply.

An entry may be drawn enjoining the consummation of the proposed contract and also a mandatory order will be granted as prayed for. The time for compliance with the mandatory feature of the order will be such as will be perfectly reasonable in view of the particular business of the defendant light company, and the dependence of its patrons for proper service, and therefore, if counsel can not agree upon what is a reasonable time, the court under all the exigencies of the case will fix it.

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This time will depend, of course, upon the number of contacts which have to be changed and the erection of poles, and so forth, and will be such length of time as will be reasonable under all the circumstances, and not be destructive. The appeal bond in this case will be fixed at five hundred dollars.

A suggestion was made by one of counsel for further oral argument in this case, but I have felt that the briefs covered the case amply and the very urgent insistence and demand for the time of the court in the other cases is such that I have deemed it no injustice to decide the case without further oral argument.

Butler, Marshall & Keating, for plaintiff.

Sater & Sater, Thomas H. Clark and J. K. Henry, for defendant.

GIVING AWAY SAMPLES OF LIQUOR IN "DRY" TERRITORY.

[Common Pleas Court of De fiance County.]

HERMAN CAPPLE V. THE STATE OF OHIO.

Decided, June, 1906.

Liquor Laws—Duty of Mayor Sitting at Trial—Fixing Time for Preparing Bill of Exceptions—Transmission of Papers to Common Pleas Court—Giving Away of Small Samples—Meaning of the Word "Beverage"—Sections 6565 and 4364-20g.

1. While it is the duty of the mayor, sitting at a trial under the local option law, to transmit to the clerk of the common pleas court the papers in the case within ten days from the allowance of the bill of exceptions, failure on his part so to do can in nowise prejudice the party seeking to prosecute error to the higher court.
2. The provisions of Section 6565, relating to bills of exceptions, are sufficiently complied with if a time is fixed at the close of the trial for the allowance of the bill.
3. A traveling salesman for a liquor house gave away samples of his goods, about a teaspoonful in each instance, in "dry" territory, for the purpose of being tasted by prospective customers. *Held*: That his action in so doing was a giving away of intoxicating liquor as a beverage.

SNOOK, J.

On November 24th, 1904, Herman Capple was arrested for the violation of the local option law, which was then in force in the village of Hicksville, Defiance county, Ohio. The affidavit charges, in substance, that the defendant, on the 23d day of November, A. D. 1904, did unlawfully give away intoxicating liquors as a beverage in the said village; that the said giving away of said intoxicating liquors was then and there prohibited and unlawful, and contrary to law. That said liquors were not furnished in wholesale quantities; that they were not given away in the private dwelling of the said Herman Capple; and that the said Herman Capple was not then and there a regular druggist. Defendant pleaded "not guilty," and on the trial before the mayor was found guilty and sentenced to pay a fine of fifty dollars and the costs of the prosecution. It was further ordered that said fine be paid to the village of Hicksville, Ohio, and that the defendant stand committed to the workhouse at Toledo, until the fine and costs were paid.

Upon the conclusion of the trial, and after judgment had been pronounced, the court fixed the 30th day of November, 1904, as the day for the signing and allowing of a bill of exceptions in said cause, and said bill was signed and allowed by said court on said day. Thereupon the mayor transmitted the bill of exceptions to the counsel for the plaintiff in error, who filed the same, together with the original papers and a petition in error in this court on the 23d day of December, 1904, after having first obtained leave of this court to file a suit in error from the decision of the mayor's court. Thereupon defendant in error filed a motion to strike the bill of exceptions and the transcript of the mayor's docket in the case from the files, for the reason, first, that the same were not filed in this court within ten days of the allowance and signing of the bill of exceptions; and, because no time was fixed for the allowance and signing of a bill of exceptions at the time the motion of the plaintiff in error herein to discharge the defendant below was heard and overruled by the court.

It will be seen that the bill of exceptions was allowed on November 30, 1904, while the petition in error and transcript was not filed in the court of common pleas until December 23d,

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1904, and not within ten days from the time said bill of exceptions was allowed. It is claimed for this reason that the bill of exceptions should be stricken from the files, and, in support of this claim, we are cited to Section 6565 of the Revised Statutes of Ohio, which, in so far as it applies to the questions so raised, reads as follows:

“And if the same is correct, he shall sign said bill of exceptions, and file the same, with the papers in the case, and note such signing and filing in his docket, and transmit the same, with the transcript of his docket and original papers, within ten days of the date of such signing, to the clerk of the court of common pleas.”

This provision of the statute is construed by the circuit court, in the 13th Circuit, at page 275, where the court say:

“It is the duty, by law, of the justice of the peace, to transmit the bill of exceptions within ten days, and, if he fails to do so, unless he has demanded his fees therefor, the person taking charge of the bill is not prejudiced by his failure, but may, within six months, file the bill of exceptions and other papers.”

The discussion of the question in point in this case is quite clear, and we think decisive of the question urged by the plaintiff in error herein. We think, under this statute, that it is the duty of the mayor to transmit the papers to the clerk of the common pleas court, and failure on his part to so do can in no wise prejudice the party seeking to prosecute error to the higher court. While the time for the allowance of a bill of exceptions was not fixed when the court disposed of the motion of the defendant below for his discharge, interposed at the close of the testimony offered in the case, yet at the close of the trial the court must have fixed a time for the allowance of a bill of exceptions, for at the end of the transcript we find this entry:

“Thereupon the court having fixed a time for the allowance and signing of a bill of exceptions herein on the 30th of November, 1904; now, on this 30th day of November, A. D. 1904, counsel for defendant presents this his bill of exceptions, and asks the same to be allowed and signed, and made a part of the record in this cause, which is accordingly done this 30th day of November, A. D. 1904.”

We think this is a substantial compliance with Section 6565. where it is provided that, "the party objecting to the decision must except at the time the decision is made, and time shall be given to reduce the exceptions to writing."

Counsel for defendant in error call attention to the case of *Harlow v. State*, 1 N. P.—N. S., page 323. It would seem, from a reading of this case, that the trial judge appeared to be of the opinion at the time his decision was announced that the time for the allowance of the bill of exceptions must be fixed at the time the exception was taken, and in support of that view cites as authority the case of *Kline v. Wynne*, 10 O. S., 223; but we do not think that this case decides the question contended for, as it seems to us the only question decided there. was that the bill of exceptions was not signed within the time provided by statute. Section 6565 was construed by the Supreme Court, in the case of *Lewis v. Bancroft*, 53 O. S., 92, and in the opinion of the court, page 94, the court say, "The docket entry does not show that plaintiff below, during the trial, or even at the close thereof, required time to prepare his bill of exceptions, and no time was appointed by the justice when the bill of exceptions should be settled and signed," thus clearly intimating that if a time was fixed at the close of the trial for the allowance of a bill of exceptions, the requirement of the statute would be met. It seems to us that any other holding would be extremely technical, and we therefore conclude that the motion to strike the bill of exceptions from the files should be overruled.

The next question for decision in the case is: Was the affidavit good? Section 4364-20c provides what needs to be set forth in such an affidavit. And all that needs to be said on this subject is that the affidavit in this case wholly meets the requirements set forth in that section of the statute.

The next question to be decided is: Did the mayor err in overruling the motion of the defendant below interposed at the close of the testimony, for his discharge, on the ground that there was no evidence offered in the case supporting the charge in the affidavit? The evidence, in substance, shows that the defendant was a traveling man, representing the Napoleon Wine Company. That his business was to procure orders for his house, for wines and whiskey. That in doing so he traveled

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around the country, and when he met a prospective customer he gave him a small sample of the liquor he wished to sell to taste in order to procure him to make a purchase. That he gave to one Harry Brandon two or three such samples, one whiskey and the others wine, about a teaspoonful in each instance. And he gave about the same amount to one John G. Bevington. It is urged by plaintiff in error that the amount given away was so small that it does not come within the meaning of the statute, wherein it is provided that the liquor must be given away as a beverage. The statute fixes no limit as to the amount to be given away before one shall be guilty of a violation thereof, and Section 4364-20c names and fixes the only exceptions to the statute; and it seems to us, that if one gives away intoxicating liquors within the prohibited territory, no matter how small the amount, if the giving away does not come within the exceptions fixed in Section 4364-20c, then such giver must be guilty. Nor is this changed by the use of the word "beverage" in the statute, for the use of the word does not materially change the law. Webster's Dictionary defines the word "beverage" as "a liquid for drinking; drink usually applied to drink artificially prepared and of an agreeable flavor; as an intoxicating beverage; specifically, a name applied to various kinds of drink." The Century Dictionary defines the word "beverage" to mean, "drink of any kind; liquors for drinking; intoxicating beverages." Surely it can not be contended that the liquor given by the defendant was not a drink, and that it was intended that the person to whom it was given should not drink the same. The facts in this case come directly within the spirit of the definition of "beverage" as laid down above by Webster and the Century Dictionary. This contention is clearly borne out by the reasoning of the court in the case of *People v. Hinchman*, (Michigan) 42 N. W., 1007, where the court say:

"Worcester defines beverage as follows: 'liquor to be drank; drink.' Webster defines the word as 'liquor for drinking.' If, therefore, Hinchman sold the whiskey to Berger as a beverage, he sold it to him to be drank; that is to be used as a drink."

Nor do we think that, in the absence of a statutory provision, the court would be warranted in fixing the amount that must be given away before one could be convicted under this

statute, for it seems that to try to so do would lead the court to no end of trouble. For, would the limit be a teaspoonful? Or a glass? Or would it be two glasses? It is clearly the duty of the court to refrain from reading into a statute any condition or exception that is not found therein, and for the court, in this case, to find the limit as to the amount that must be given away before one could be prosecuted under this statute, would be to read into the statute an exception that is plainly not found therein. Further, we think that this question has been passed upon by the court of last resort of at least two states. If these cases are not like the case at bar in all their facts, they at least decide the principle involved in the case at bar. We think, however, that the facts involved in those cases are substantially the same as the facts involved in the case at bar, and would invite the attention of anyone interested in the subject, to a careful consideration of these cases, where the question is ably and thoroughly discussed. *State v. Jones* (Minn.), 92 N. W., 468; *State v. Hesterly* (Missouri), 76 S. W., 984.

The only other question made by plaintiff in error is that the court erred in ordering the fine, which was imposed upon the defendant, to be paid to the village of Hicksville. There was no error in this action of the court, as Section 4364-20g provides that all fines collected under the provisions of the act which was violated, shall be paid into the treasury of the corporation wherein the fine is imposed. Under this section of the statute, the mayor, it seems to us, had jurisdiction to order the fine to be paid to the village.

For these reasons the action of the mayor will be affirmed with costs.

Donovan & Worden, for plaintiff in error.

Geo. D. Simmons, for defendant in error.

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TAXATION OF RAILROADS.

[Superior Court of Cincinnati, General Term.]

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO.
v. RUDOLPH K. HYNICKA, TREASURER OF HAMILTON
COUNTY, OHIO.

Decided, September 13, 1906.

Taxation—Railway Property Taxable as a Unit—Property Which May be "Localized"—Bridges, Viaducts, Trestles, Side-tracks, Slopes, Freight Yards, and Ground Purchased for Connection Tracks—Sections 2770 to 2776—Powers of Auditor under Section 2781a.

1. In entering for taxation the property of a railroad which lies partly within and partly without the state, Sections 2772 and 2776 should govern, and not Section 2774.
2. The bridge of the Cincinnati Southern Railway, which spans the Ohio river, together with the viaduct or trestle leading up to it, constitutes, with the underlying ground, a part of the road-bed, and is property necessary to the daily operation of the road, and there being no additional charge to shippers or passengers on account of the use of this bridge and viaduct, it should be taxed with the remainder of the road as a unit and "averaged" over the entire road.
3. The side-tracks of the company, which are in daily use for the loading and unloading of freight, and ground purchased for the purpose of establishing a connection track with another railroad, do not constitute real estate, structures, or stationary personal property to be "localized" for taxation, but should likewise be "averaged" for taxation over the entire road.
4. Such being the status of railroad property of this character, the auditor can not, after having ascertained its value under Section 2772, again tax it as omitted property; nor can he treat it as omitted property which has escaped taxation; nor would he be justified in again placing it on the duplicate on the ground that his action was in effect a revaluation or a correction of an undervaluation.

HOFFHEIMER, J.; FERRIS, J., concurs; HOSEA, J., concurs in a separate opinion.

This was an action to enjoin the treasurer of Hamilton county from collecting taxes on certain additions made by the auditor to the tax duplicate on property of plaintiff for the years 1891 to 1899, inclusive.

The cause was reserved to the general term for decision. The plaintiff is the lessee of the Cincinnati Southern Railway, a line built and owned by the city of Cincinnati. The road, as is well known, extends from the city of Cincinnati, Ohio, to the city of Chattanooga, Tenn. Under the lease of said road the lessees pay all the taxes. The agreement includes the years for which the additional taxes herein are sought. During these years, namely, 1891 to 1899, both inclusive, plaintiff made to the auditor of Hamilton county, on printed forms furnished for that purpose by the auditor of state, returns of its taxable property. The statements for the respective years consist of several schedules. According to *Schedule E* (for the years 1892 to 1899) the company returned: "*Tracks, including road-bed, right of way, etc., owned or held by said company in the state of Ohio as exist on said date.*" The return for 1891, although different in form, is to the same effect, substantially. Under the schedule the plaintiff stated it had 56-100 of a mile of main track in Ohio, and it placed a value thereon of \$12,000 per mile, and that it had side-tracks to the extent of 10.19 miles (in 1891), increasing gradually, however, throughout said years to 11.180 miles (in 1899), upon which it placed a valuation of \$2,000 per mile. The evidence shows that the auditor, acting as the board of appraisers and assessors for said railway company, fixed the valuation of the main track at \$12,000 per mile, and the side-track at \$2,000 per mile for the years in question (Bill of Evidence, page 201, defendant's exhibit 3), and accordingly such valuations were placed upon the duplicate, and taxes were duly paid by plaintiff. The stem or main track of the railroad begins, as shown by the evidence, at Gest street, in the city of Cincinnati, and approaches and crosses over the Ohio river by means of a trestle and bridge structure, built by the Trustees of the Southern Railway expressly for that purpose. The trestle structure is about 1,299 feet in length, and the bridge structure on the Ohio side about 1,233 feet in length, and both are described as numbers 1 and 10 in the petition. The bridge and trestle occupy the lots numbered in the petition 2 to 9 (pages 2 and 3), also 11 to 16 (pages 4 and 5) inclusive. The evidence shows that all these lots are necessary for the maintenance of said bridge and trestle. The "side-tracks" in question are built on lots number 5 to 9, also

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4 to 35, described in the petition number 1 to 35, inclusive (pages 5 to 9). The parts of said lots not covered by rails are used as "slopes" to support the tracks, and also for the loading and unloading of freight, in the daily operation of the business. The eight parcels of ground described in the petition as lots 1 to 8 (pages 10 and 11), all the evidence shows, were acquired by the trustees to establish a connection with the C., H & D. Railroad. The ground lies very low, and a considerable fill will be required to make said lots available for said purpose. At the time in question the fill had not been made, nor was the connection made, nor were said lots used for purposes other than those of the railroad. In 1899 the auditor claimed that the bridge and trestle, and several lots thus briefly referred to, were "lands, town lots or improvements, structures or fixtures thereon, subject to taxation within this county"; that same had not been returned by the assessor or had escaped taxation through error of the auditor. He therefore proceeded to ascertain the value of the bridge, trestle and lots as separate items and placed the entire sum on the duplicate, claiming that the true value of said property was \$265,580 more for each year in question than the value returned, assessed and taxed. Upon this valuation he added taxes as far back as the last decennial appraisement, inclusive of 1891, in all in the sum of \$64,567.79, and also penalties. Thereupon plaintiff brought this action to enjoin the collection of said taxes, and a temporary order was allowed by the court below.

In 1900, the auditor, without removing from the duplicate of real estate the additions thus made by him, put the foregoing described property on the duplicate as *personal* property also, and added simple taxes for the five years, including and preceding the year 1899 in the sum of \$42,514.03, and also penalties. The plaintiff by supplemental petition thereupon asked that the collection of the additional taxes be enjoined, and again a temporary restraining order was allowed.

Under the issues the question is, Was the auditor's action in thus attempting to separately tax the property involved valid or invalid? The plaintiff claims it was invalid, because, it is urged, the *bridge and trestle* and *side-tracks* and *lots*, more specifically described in the petition were "*road-bed*" and "*property necessary to the daily operation of the road,*" and was

therefore taxable as a unit; that is to say, averaged over the entire road. In accordance with this theory its returns for taxation were made. On the other hand, defendant contends that the statutes (particularly Section 2774) with reference to the taxation of railroad property, contemplate two distinct classes: (a) a class to which belongs main track, rolling stock, road-bed, supplies, money and credits; (b) the class to which belongs real estate, structures and stationary personal property. And defendant claims that the property of Class A is property that may be "spread out," or apportioned over the entire road for taxation, while that of Class B is property that is to be *localized* for taxation. Defendant contends that the property involved in this action all falls in the latter class, and was therefore to be locally taxed, either as personalty or as real estate, whichever it may be found to be. A determination of the questions presented involves Sections 2770 to 2776 of the Revised Statutes, which are the sections relative to the taxation of railroad property. The Cincinnati Southern Railway, which is the property operated by plaintiff, the lessees of the trustees of the city of Cincinnati, is not wholly within the state of Ohio, but is partly within that state (only in the county of Hamilton) and partly without the state. In taxing the property of such a railroad, we are of opinion that Sections 2772 and 2776 in particular govern, and not Section 2774. Section 2772 is as follows:

"It shall be the duty of each board to meet in the month of May in the present and each succeeding year, at such time as the president thereof may appoint; and if no meeting be appointed by him before the second Tuesday in May, the several county auditors shall meet on that day in the place where the proper railroad for which said auditors constitute the board as aforesaid, has its principal office, or in the principal city or village upon the line of such road, as the case may be, and proceed to ascertain all the personal property, which shall be held to include road-bed, water and wood stations, and such other realty as is necessary to the daily running operations of the road, monies and credits of such company, and the undivided profits, reserve or contingent fund of such company, whether the same may be in money, credits, or in any manner invested, and the actual value thereof in money."

By this section the board is required to ascertain all the *personal property of the railroad*. The section, it will be observed,

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also describes with particularity what the *personal property* consists of:

"It shall be held to include *road-bed*, water and wood stations and such other realty as is necessary to the daily running operations of the road."

Section 2776 is as follows:

"When any railroad company has part of its *road* in this state and part thereof in another state or states, the proper board shall take the value of *such property*, moneys and credits of such company so found and determined, as aforesaid, and divide it in the proportion the length of such road in this state bears to the whole length of such road, and determine the principal sum for the value of such road in this state accordingly, equalizing the relative value thereof in this state as above provided."

This section, it is evident, has reference to a railroad that has part of its *road* in this state and part thereof in another state or states. In our opinion the words "*such property*" refer back to Section 2772, and "*such property*" shall be distributed for taxation, in the proportion the length of such road bears to the whole length of such road and determine the principal sum for the value of such road in this state accordingly." The "*such property*" (personal property under Section 2772) here referred to therefore includes "*road-bed*" and "*realty necessary to the daily running operations of the road*." In other words, "*road-bed*" and "*other realty necessary to the daily running operations of the road*" are made personal property for taxation purposes. Such being the construction to be placed on said statutes, the question would be: Is this bridge structure or trestle and the ground on which it rests *road-bed* and *realty necessary* to the daily running operations of the road? The uncontroverted evidence shows it is property necessary to the daily running operations of the road. Indeed, counsel for defendant admit such to be the fact. Courts of dernier resort in several of the states and the Supreme Court of the United States have many times held that a bridge or structure built for purposes such as the one in controversy is a necessary part and parcel of the road itself; that it is "*road-bed*." In the language of Justice Gray it may be said to be, "*Railway viaduct rather than a bridge*." "It is a road built over water instead of on land." *Railway Co. v. Keokuk Bridge Co.*, 131 U. S., 371.

See, also, *State, ex rel Tillery, v. Hannibal & St. Joe R. R. Co.*, 97 Mo., 348; *People v. I. C. R. R. Co.*, 215 Ill., 177; *Schmidt, Collector, v. Galveston, Harrisburg & San Antonio Railroad Co.*, 24 Southwestern Rep., 547; *St. Louis & San Francisco Railroad Co. v. Williams*, 53 Ark., 58; *State Central Railroad Co. v. Mutchler*, 41 N. J. L., 96; *People v. Atchison, Topeka & Santa Fe Railroad Co.*, 206 Ill., 252; *Anderson v. C., B. & Q. Railroad Co.*, 117 Ill., 26; *Chicago, St. Louis & New Orleans Railroad Co. v. Commonwealth*, 115 Kentucky, 278; *Union Pacific Railroad Co. v. Hall*, 91 U. S., 343.

These authorities would seem to be decisive, but defendant, in combating the contention of plaintiff, relies on *Cowen v. Aldridge*, 114 Fed. Rep., 44, and insists that said case is decisive of the claim here made by the treasurer, namely, that Section 2774 governs the taxation of this bridge structure and the remainder of the property here involved, and that the property in controversy falls within Class B (*supra*). Even if we were to hold that Section 2774 was applicable and controlling we fail to see, in view of the construction placed upon that section by our Supreme Court, how such position could avail defendant. In *Railroad v. Commissioners*, 48 O. S., 251, speaking in regard to Section 2774, Bradbury, J., said:

"This section provides that such proportion of the entire property of the railroad (except realty not necessary to its daily running operations) shall be taxed in each district through which it runs, as the length of the road in such district bears to its whole length."

The class, therefore, into which defendant insists the property in controversy belongs (property to be localized) is *realty not necessary to the daily running operations of the railroad*. Obviously the property in controversy can not belong to that class because as we have seen it is admittedly property necessary to the daily running operations of the railroad. For this reason *Cowen v. Aldridge* is not in point. In the next place, the facts in *Cowen v. Aldridge* were so essentially different from those in the case at bar that a close reading of that case will reveal why the court held the "bridge" taxable as a bridge (it was not road-bed) and property to be localized. In the *Bellaire* case (*Cowen v. Aldridge*) the bridge was not, as a matter of fact, a necessary

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part of the railroad proper. It was built to connect two railroads, the Central Ohio Railroad Co., which had its railroad on the Ohio side of the river, and the Baltimore & Ohio Railroad Co., whose railroad is built to the east side of the Ohio river; that is to say, on the side opposite. The bridge connects two populous towns, and the evidence shows that heavy additional charges were made to passengers and shippers of freight. The bridge may be said to have had a business, and a financial as well as legal character clearly distinguishable from "main track" laid upon it. It had, aside from its use for main track, other distinguishing and valuable uses. The bridge in the case at bar was built by the Trustees of the Southern Railway as part and parcel of said railway, and in order to permit its trains to go from the terminal in Ohio to the terminal in Chattanooga. The trustees had no power to build a bridge for any other purpose than that of a railroad. They certainly had no power to build a bridge for use as a bridge independently of the necessary road-bed. (On this point see *Union Pacific Railroad Co. v. Hall*, 91 U. S., 343-350-351). And furthermore the testimony shows the bridge was adopted for and to be used for the purposes of a railroad solely. True, it appears that the lessees have built a footpath at the expense of the citizens of Ludlow, and it seems a nominal sum is collected for the purpose of keeping said footpath in repair, but in our judgment the power given the trustees to build this bridge, the purpose for which it was built and its use under the law indicate the true character of this bridge for the purpose of determining the legal question as to the manner in which the same shall be taxed, and the mere incident of the building of this footpath by the lessee can not alter the true character of the structure for taxation purposes. It is also clear that, as far as this railroad is concerned, no additional charges are exacted of shippers or passengers, and the mileage on this bridge is treated by the railroad precisely as is every other mile of road. (See the testimony of Mr. Nicholson.) That the *character* of the bridge in *Cowen v. Aldridge* was a vital consideration is evident by what the court says at page 50:

"Additional rates are charged to passengers and freight using the bridge. It has a distinct value as a bridge, irrespective of its present use for railroad purposes."

And again at page 52 the court says:

"It may be a practice to assess bridges as part of such main track of railroads in Ohio. It may be that many bridges have no value except to carry the track of the company. Whether this practice, if it exists, be right or wrong, is immaterial here in view of the character and ownership of the bridge in question."

It will be observed that not one of the authorities cited (*supra*) holding that a bridge is road-bed or part of the road was referred to by the Circuit Court of Appeals. The failure to take notice of these authorities can only be satisfactorily explained upon the theory that the facts in that case, as already indicated, stamp the Bellaire bridge with a character of its own—a thing separate and apart from the railroad. In short, it was a bridge pure and simple.

Finally, the decision in *Cowen v. Aldridge* is based solely on *Cass County v. C., B. & Q. Railroad Co.*, 25 Neb., 34. The court, in 114 Fed. Rep., at page 50, said (referring to the bridge in question):

"It is in our judgment a structure within the meaning of the statute and to be taxed as other local structures are in the district where it is situated. Similar considerations led the Supreme Court of Nebraska to like conclusions in a well considered case."

But the very case upon which *Cowen v. Aldridge* was based was itself subsequently overruled in *C., B. & Q. Railroad Co. v. Richardson*, 61 Nebraska, 515.

In view of these considerations therefore, and under the circumstances of the case at bar, whatever view may be taken of *Cowen v. Aldridge*, it would be manifestly unsafe to apply that decision. On the other hand, in view of the authorities herein cited, and especially mindful of the language of our Supreme Court in 48 O. S., 251, it seems to us a proper interpretation of the statutes involved would require that the term "road-bed" as used in the statute must be held to include a bridge, when that bridge, as in the case at bar, was built for and is used solely for the purpose of supporting the railroad tracks and is part and parcel of the road and is necessary to its daily running operations. Nor can we agree with defendant that this interpretation renders Section 2776 unconstitutional. This section has reference only, it will be noticed, to railroad property partly within

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and partly without the state. Our Constitution aims to tax all *property*. The property of a railroad is not exempted by this section. A railroad could not fairly be valued other than as a unit—as a continuous line. This is necessarily so, and our state policy recognizes the fact. The section refers only, as we have endeavored to show, to the *property* described in Section 2772. Merely because the section is silent as to the property of an interstate railroad which may have a fixed situs, and which may be found to be not “necessary to the daily running operation of the road” is no reason why said statute can be said to create an exemption as to such property. The taxing statutes would reach such property. One thing appears certain: Section 2776 does provide a method, a uniform mode of taxing the kind of property mentioned; that is to say, property necessary to its daily running operation partly within and partly without the state, and such a system for taxing interstate railroads or companies has met the approval of the Supreme Court of the United States. *Maine v. Grand Trunk Railway*, 142 U. S., 217; *Pittsburg Railway Co. v. Backus*, 154 U. S., 430; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S., 18.

In *Pittsburg Railway Co. v. Backus*, *supra*, the Supreme Court said:

“Nevertheless it is ordinarily true that when a railroad consists of a single continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this court several times as eminently fair.”

Are the lots and portions of the streets upon which side-tracks are laid, separately taxable as the treasurer claims, or are they also to be considered “road-bed” and “realty necessary to the daily running operations of the road,” and as such apportioned by mileage? Under the evidence we find that the side-tracks and the lots on which they are laid are necessary to the daily running operations of the road, and we are of opinion that they, too, must be considered as road-bed, and not to be taxed as separate items. In *Chicago & Alton Railway Co. v. The People*, 98 Ill., 350, the court said:

“We can see no reason why the term right of way should be confined to the land over which the main track of a railroad

should be constructed. The land upon which a side-track, a switch, or a turn-out is built, and in actual use by the company in the business for which it is organized for all practical purposes is as much held for right of way as is the land upon which the main track is constructed. In the operation of a railroad, it is necessary that trains should pass each other, and hence the necessity of turn-outs, switches and side-tracks. In the loading of cars, transfer of cars, the making up of trains and innumerable other instances that might be named in the prosecution of its business as a common carrier, side-track, switch or turn-out passes can be termed a proper transaction of its business as the main track itself. We are, therefore, of opinion that the land held and in actual use by the railroad company for side-tracks, switches and turn-outs must be regarded, within the meaning of the revenue law, as a part of the right of way of the company. It is used in the transportation of freight, and also for the purpose of carrying passengers alike with the land upon which the main track is constructed, and upon which principle the land upon which the main track is laid, can be held to be right of way and the land over which a side-track switch or turn-out passes can be termed something else, we are at a loss to understand. "

See, also, *Chicago & Northwestern Railway Co. v. Miller*, 72 Ill., 144; *People v. The Board of Equalization*, 205 Ill., 296; *C., M. & St. P. Railway Co. v. Cass County*, 76 N. W., 239; *St. Louis, Iron Mountain & Southern Railway Co. v. Miller*, 67 Ark., 498; *Pfaff v. Terre Haute & Indianapolis Railway Co.*, 18 Ind., 144; *Burlington & Missouri River Railroad Co. v. Lancaster County*, 15 Neb., 251; *State v. Chicago, Rock Island & Pacific Railway Co.*, 162 Mo., 391. These authorities, we think, are decisive.

We likewise think that the parcels of ground (numbers 1 to 8) purchased for the purpose of making connections with the C., H. & D. Railway Company, was also properly returned for taxation by the railroad company and is not separately taxable. We find from the evidence that the lots were purchased for the purpose mentioned, and were to be used for such purpose and no other when filled; that such property devoted to such purpose is a part of the road as a whole, and was properly returned by the plaintiff company for taxes apportioned on the mileage basis, it seems to us, was decided in *Burlington & Missouri River Railroad Company v. Lancaster County*, 15 Neb.,

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251 (18 N. W., 71), and also in *State v. Chicago, Rock Island & Pacific Railway Co.*, 162 Mo., 391. In the latter case it was held:

“[*Taration.*] Switch-yards and other real property necessarily appurtenant to the railroad’s efficient equipment as a means of traffic are not subject to taxation by the local authorities, but are to be included in that class of property which the statute requires to be assessed by the State Board of Equalization, and, although the railroad may have owned the lots for some years and as one yard and part of them for stock-yard purposes, yet, if it is used for no other purpose and does not appear to have acquired more land than was necessary for switch-yard purposes in view of the prospective growth of the city and the business, the property is to be assessed by the state board.”

Finally, the property involved in this controversy was returned for taxation and the taxes found due thereon duly paid by plaintiff after the auditor, under and by virtue of Section 2772, had ascertained its value. The evidence shows that the auditor undertook to tax it again on the theory that it was *omitted* property. All the steps taken by him show that in the opinion of that officer, it was property that had *escaped taxation*. But as we have already pointed out, it did not escape taxation and could not be said to be omitted property. The only question remaining then would be: Was the auditor justified in again placing this property on the duplicate on the ground that his action was in *effect a revaluation or correction* of an undervaluation?

If the auditor has any such powers in respect to property of this character—property which according to law he had appraised and assessed in the first instance and no doubt correctly—that power is to be found in Revised Statutes, 2781a.

The exception engrafted upon the statute, it will be noticed, speaks only of *omitted* property: that is, property that has *escaped* taxation. Certainly, it was not intended that there should be a reassessment or a reappraisement of that which the officer had already appraised. Otherwise, as is pertinently asked by counsel for plaintiff, how many times is it necessary to assess railroad property? In our judgment this section gives the board *jurisdiction* to appraise and assess *omitted* property

and denies *jurisdiction* to reassess and reappraise that which has already been assessed according to law.

Moreover, it seems to us a conclusive answer to the assessment in this case is found in this fact that the auditor according to the evidence (page 183, Bill of Evidence) stated that in undertaking to make the revaluation *considered nothing outside of the county of Hamilton*. The auditor's action, therefore, even if he has power to reassess, was not such a reassessment as would be proper, because Section 2776, as we have seen, would make it imperative that property of an interstate railroad be apportioned by mileage. This was not done.

In conclusion, we find under the law and the evidence that the auditor in seeking to place this property on the duplicate as real estate under Section 2803, acted without authority. Section 2772 governed. When subsequently by virtue of Section 2781a, he again sought to place this property on the duplicate as personalty as *omitted* property, or as *revalued* or *reassessed* property, he again acted without legal jurisdiction. As stated, the railroad company made its returns according to law and paid the taxes contemplated by law on the property involved. It was, therefore, entitled to the injunction originally allowed, and we order the same to be made perpetual.

Harmon, Colston, Goldsmith & Hoadly, for plaintiff.

Alfred B. Benedict, for defendant.

HOSEA, J.

I am in accord, in the main, with the views of my respected colleagues expressed in the foregoing opinion and with the results stated. It is perfectly clear to my apprehension that the bridge in question, with its approaches, is part of the road-bed—a "railway viaduct"—constituting part of the main thoroughfare and necessarily used in the "daily operations" of the road. That the value thereof is to be carried into the total and distributed to the counties for taxation, as provided by law, necessarily follows.

It is not so clear to my mind that a terminal yard and other structures for the storage of property and kindred uses, however convenient, and necessary for use in the general operation of the railway, are included in the intent of our tax statutes.

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This language, when contrasted with the corresponding phrases in the taxation statutes of other states, under which the cited decisions were rendered, seems, at first blush, to have a limiting purpose that is not without strong reasons in its support. The phrase "*daily running operations*" of a railway, would seem to have direct reference to the actual running of trains and nothing more. The language chosen is at least strongly suggestive; and this view, it may be said, is more directly in accord with the reasons underlying the principle of distributive taxation of such property as is of a transitory or non-localized character. Indeed, the reasoning in *People v. State Board of Equalization*, 206 Ill., 296, seems to lay stress upon this characteristic even under statutory language of a broader scope. The same reasoning appears in *Chicago & Alton Railway Co. v. The People*, 98 Ill., 350, where thirty-two acres of railroad "yards" at Burlington, were held to belong to the distributable class under the statutory phrase "right of way." The court cites the necessity of side-tracks and turn-outs used to enable trains to pass each other and proceeds to class "yards" as within the intent of the law, by parity of reasoning, because necessary to the use and operation of the railway.

In the former case the yards at Chicago were held to be within the same principle of classification. But in these and other cases cited, the decisions rest upon statutes of broader definitions than our own—such as "track," "main track," and "right of way," used in the general operations of a railway. In contrast with these phrases the limitation to property required in the "*daily running operations*" of a railroad, seems to suggest a narrower definition, and it may be said that yards, used primarily for the storage of cars when not in use, fall without the limitation.

Much may be said on both sides of the question; but as the question, in its broader aspect as relating to the policy of taxation, is practically covered by the reasoning of courts of last resort in other states, and by the Supreme Court of the United States, upon the general principle involved, I am disposed, to the extent involved in the present controversy, to give my concurrence to the ruling of the majority, but with these suggestions.

GUARDIANSHIP.

[Common Pleas Court of Summit County.]

IN RE GUARDIANSHIP OF ELIAS BREITENSTEIN.

Decided, August 16, 1906.

*Guardian—Finding of Necessity for Appointment of—Not a Final Order
—And not Appealable—Section 6407, Relating to Appeals.*

Application was made to the probate court for the appointment of a guardian for Elias Breitenstein; the court, on hearing, entered on the record its finding and decision that due notice of said application had been given, that said Elias Breitenstein was a resident of the county and was an imbecile, and that it was necessary to appoint a guardian for him; but no guardian was appointed, and no further order was made by the court.

Held: Elias Breitenstein is not entitled to appeal from such finding or decision of the probate court.

WASHBURN, J.

John Breitenstein made application to the Probate Court of Summit County for the appointment of a guardian for the person and estate of Elias Breitenstein; notice was given and hearing had, and the journal entry showing the action taken by the probate court is as follows:

“This day this matter came on to be heard on the application of John Breitenstein for the appointment of a guardian for the person and estate of Elias Breitenstein, a resident of Franklin township, in said county, on the ground that he is an imbecile, and was submitted to the court on the evidence; on consideration whereof the court find that said Elias Breitenstein and all his next of kin resident of said county, have had due notice of the pendency and prayer of said application according to law and our former order. The court further find from the evidence that said Elias Breitenstein is an imbecile, and that by reason thereof he is incapable of caring for his person and estate; to all of said finding said Elias Breitenstein, by his attorneys, does here and now except. Thereupon came the said Elias Breitenstein and filed his written motion in this court for a new trial. Thereupon this matter came on to be heard on said motion and the evidence, and was submitted to the court; on consideration whereof the court overrules said motion, to which order said Elias Breitenstein excepts, and gives notice of his intention to appeal this matter to the common pleas court of

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said county, for which purpose bond is fixed at the sum of \$200. Thereupon came said Elias Breitenstein and filed his appeal bond herein in the sum of \$200 with Mary Arter and Thomas Baugman as sureties thereon, to the approval of the court. It is therefore by the court ordered that a transcript of the docket and journal entries herein, together with the original papers filed in this matter, be duly certified together for the purposes of filing in the court of common pleas of said county."

The cause has been submitted to this court on motion to dismiss said appeal, on the ground that the action of the probate court was not such an order, decision or decree as is appealable. The statute, Section 6407, provides that:

"Appeals may be taken to the court of common pleas, from any order, decision or judgment of the probate court, * * * in proceedings to appoint guardians for imbeciles, * * * by any person against whom such order, decision or decree shall be made, or who may be affected thereby."

The "order, decision or judgment" referred to in this statute means a final order, decision or judgment, and although it is difficult to always determine just what orders, decisions and judgments are final, the policy of the law seems to be to prevent delays and interruptions in proceedings in probate court, by permitting appeals from only such orders, decisions and judgments as are plainly final in their character. 31 O. S., 201; 34 O. S., 280.

In the opinion of the Supreme Court in the 34 O. S., at page 288, the following language is used:

"And we believe that it may be stated as a general rule, that an order to be appealable, must affect property rights and not merely the administration of the trust."

The property rights of Elias Breitenstein were not affected by the action taken by the probate court in the case at bar; until a guardian was duly appointed there could be no interference with or control of his property or person. The action of the probate court gave no one authority to take possession of his property, collect or pay his debts, provide for his support, or bring or defend suits for him. All of these things a guardian duly appointed could do.

Not only does the action taken by the probate court fail to affect the property rights of Elias Breitenstein, but a careful

reading of the journal entry of the probate court in question, shows that the order made by the probate court, if it can be said there was any order at all made, falls far short of being a final order; it is more in the nature of a finding of fact, which gave the court jurisdiction and authority to make a final order.

The law did not even require the probate court to enter on the record the finding that said Elias Breitenstein was an imbecile and that it was necessary to appoint a guardian for him. That is according to the approved practice and is quite proper.

But, strictly speaking, while the law required the probate court to find these facts before a guardian could be legally appointed, it did not require the probate court to make a record of such finding.

As was said in the 16th O. S., at page 465: The law requires the probate court to keep a record

“which shall contain an entry of the appointment of executors, administrators and guardians, and all partial and final accounts of executors, administrators and guardians, and the orders and proceedings of the court thereon.

“Whilst the statute requires the record to contain ‘an entry of the appointment’ of all guardians, it nowhere requires that the record shall show the existence of a state of facts such as to warrant the exercise of its authority, or the evidence upon which the court relied in making the appointment. Nor does any rule of law require this of such a court.”

In this same case, at page 466, the court speaks of the order of appointment as being the “final order,” in a proceeding for the appointment of a guardian:

“All questions necessarily arising in the case, become *res adjudicata*, by the final order of appointment, which binds all the world, until set aside or reversed by a direct proceeding for that purpose.”

It seems to me that the order made by the probate court in this case at bar is not such an order as is appealable, and the appeal will therefore be dismissed.

G. M. Anderson, for applicant.

Kohler & Mottinger, for Elias Breitenstein.

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SURPRISE AT SEVERITY OF SENTENCE.

[Common Pleas Court of Lucas County.]

THE STATE OF OHIO V. THE HYGIEIA ICE COMPANY ET AL.

Decided, August 4, 1906.

Constitutional Law—Penal Clause of Valentine Anti-Trust Act—Not Invalid for Lack of Uniform Operation—Classification of Persons and Corporations—Criminal Procedure—Misleading Defendants to their Prejudice—Mistaken Expectation of Leniency—Prosecution of Ice Men—Under the Anti-Trust Law—Affdavits of Prejudice—Legal Ethics.

1. The imprisonment or penalty clause of the Valentine Anti-trust law is not in contravention of the constitutional requirement that all laws of a general nature shall have uniform operation throughout the state.
2. What the court said and did during the trial of this case did not mislead the defendants into withdrawing their pleas of not guilty and entering pleas of guilty, or to the taking of other action to the prejudice of their rights; they were surprised, not by any wrong or unfair thing which the court did, but by the severity of the sentence imposed; and in the entire absence of any promise or intimation of leniency, the misjudgment of the defendants and of their attorneys as to the attitude of the court with reference to the nature of the offense committed and the degree of punishment which should be imposed is not ground for vacation of the sentences which were pronounced.
3. The rule safeguarding the rights of a prisoner, which applies to extrajudicial confessions, should not necessarily be applied to a confession made in court; and were this not true, it would not follow that it should be applied where intelligent and shrewd business men, flanked by lawyers among the best in the state, have speculated for weeks as to the best thing to do, have consulted with the prosecutor, and after turning the matter over in every possible light, conclude to plead guilty and throw themselves on the mercy of the court.

BABCOCK, J.

The three motions of the several defendants have been heard and will be disposed of together as heard. The vital questions are the same in each. It is true that in Joseph Miller's case a

trial and conviction had already taken place and motions for new trial and in arrest of judgment had been filed, while in the cases of Reuben C. Lemmon and Roland A. Beard, defendants, trials had not taken place, but they were before the court and awaiting trial and had pleaded not guilty to the charge preferred. On June 11th, these defendants withdrew pleas of not guilty and pleaded guilty. Later defendant Miller withdrew both of his motions and awaited sentence. His motion is for vacation of the sentence pronounced upon him with application for reinstatement of the same as they stood before withdrawal, while Lemmon and Beard's motion is for the vacation of the sentences with application for leave to withdraw the pleas of guilty and entering in their stead pleas of not guilty. The grounds of vacating the sentences are so nearly alike that the court can properly make its findings of law and fact on all three motions at the same time.

The movers in all the motions contend for four propositions:

1. That Section 4427-4 of the Revised Statutes is unconstitutional so far as the imprisonment clause is concerned.
2. That the court promised leniency to defendants if they would plead guilty, and therefore misled them to their prejudice.
3. That the court, by words and conduct, misled them into pleading guilty, to the like prejudice of their rights as defendants in the case.
4. That said defendants were wrongfully induced, and in violation of their rights, were led to withdraw their pleas of not guilty and plead guilty through hope and expectation of leniency excited in their minds by counsel who were laboring under misapprehension and mistake as to leniency of sentence about to be pronounced.

While this grouping is not in the language of the motions, it does cover the grounds contended for.

The first question, then, in the order named, is that of the power to imprison for violation of the said sub-section styled the imprisonment or penalty clause of the so-called Valentine Anti-trust law. Sub-section 12 of said act reads;

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“The word person or persons, whenever used in this act shall be deemed to include corporations,” etc.

It is contended that this act providing for fine and imprisonment for natural and artificial persons alike, is invalid as being in violation of Article II, Section 26, of the Constitution, which section provides that, “all laws of a general nature shall have a uniform operation throughout the state.” It is contended that since corporations can not be imprisoned, natural persons are discriminated against by this imprisonment clause. It is further contended that if a classification may be made, this act is not saved from unconstitutionality, for the reason that the Legislature has not made any such classification.

The court is of opinion that the first contention is without force, for the reason that, were it otherwise, no criminal act could stand which omitted corporations from its provisions. This seems true for the reason that an entire exemption of artificial persons would be as grievous as a partial exemption—in fact, it would be a wider departure from uniformity. A law operates uniformly when it has uniform operation upon all of a particular class, if the classification made is a reasonable one.

It is contended that the Legislature has not attempted any classification, and therefore that the statute can not be saved on the classification theory. The court does not concede the proposition that classification between natural and artificial persons is necessary to meet this constitutional provision; but for the argument's sake assumes the contention of counsel to be correct and is seeking to determine whether classification in fact has not been made. If the court apprehends the claim of counsel, it is that there has been a classification made of natural persons on one side and artificial persons on the other. The complaint is of this classification, yet the fact of classification is denied. But it is said that a classification involves a purpose to classify which is obvious upon the face of the statute, and this plainly shows that they did not have classification in mind; for it is contended that the Legislature would not have laid a more grievous burden on individuals than they would on corporations which are known to be the class against which the corrective force of this statute is aimed. It appears to the court that this is a beg-

ging of the question; that it is speculative and fanciful; and, finally, that there is nothing in even-handed justice calling for any different penalty upon artificial persons than for natural persons. At least the court feels it is not justified in saying that the Legislature may not have taken this brief manner of classifying by expressing it all in one section of the statute, leaving it to the very nature of the two different kinds of persons to suggest the classification. I am further inclined to believe that when a law operates uniformly on all natural persons within the limits of the state, it operates uniformly.

At a time when the constitutional question is pending in the circuit court and when that question is not plainer than it is in this case, it would be manifestly rash for the court, on this motion, with the consequences involved, to hazard the opinion that this solemn enactment of the Legislature is invalid, and when, as said by the Supreme Court in *Western Union Telegraph Company v. Mayer et al*, 28 O. S., 540, that: "Unless it manifestly contravenes the Constitution, the judicial department is not warranted in declaring it void."

The second ground for setting aside the sentences is withdrawn from consideration by the movers, who say that they do not claim any promise expressly made by the trial judge and have never intended to be so understood.

The third ground is the claim that the court, by what it said and did, misled the defendants into withdrawing pleas of not-guilty and entering pleas of guilty to the prejudice of their rights. This does not involve the question of express promise, but of indiscretion or that which amounts to an implied promise of the court resulting in an injury to the defendants and which fairness and justice requires should be repaired by putting the parties back in the position they were in before. The question is this: Did the trial judge do or say anything to mislead these defendants to their prejudice? If he did the sentences should be set aside. Before taking up in detail the history of what took place leading up to the sentences, I wish to say that I have been struck with the unusual care taken to avoid embarrassing complications. The parties handled each other at arms length. The defendants' counsel were unusually delicate in observing the

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ethics of the profession, in avoiding any attempt to either influence the trial judge or solicit favor at his hands.

In May, they sought to bring about a conference with the court through the prosecuting attorney. This is not unusual. The prosecuting attorney is necessarily in close relationship with the trial judge. He declined to take any part in this, and told the parties to speak for themselves. They first concluded to do this, but, on second thought, abandoned it.

On June 6th, the Miller case had reached that stage in which the state had substantially made whatever case it had. It seems that a contract signed by these parties who constituted the Toledo Ice & Coal Company and the Hygeia Ice Company, had been introduced in evidence, and which, unexplained, was very damaging to the defense. It was consequently liable to be an embarrassing thing to these other defendants when their cases were put on trial. From what the trial judge said at the time of sentence as to the powers of the court to accomplish in this class of cases the real ends of justice, it would seem that he conceived this idea, that the defendant Miller was in danger of embarrassing himself and possibly of swearing falsely if he took the witness stand and denied the combination, and that, if there was a combination, it was in the interest of public justice that it be broken up and restitution made of such money as had been extorted from the customers. He realized the delicacy of the position. He must not assume but what Miller had a good defense; neither must he assume that there was any combination, notwithstanding what appeared in the state's proof; he must not do anything that would injure the defendant in the conduct of his case, and at so critical a juncture; yet it apparently seemed to him that he might be of service to public justice and subserve the interests of all parties if the defendants could see their way, in case they were guilty, to obey the law and make some reparation for the wrong. If he safeguarded all these rights, it was proper that this idea should be conveyed to Miller's counsel, Alexander Smith. But it must not be done so as to invade his rights and presumption of innocence with which the accused stood clothed.

The trial judge is uncertain which motive is the strongest with him leading him to do what he did. He says that he had no clear idea as to what could or ought to be done to accomplish the ends of justice; he only wanted Mr. Smith to think about it and left it to his good judgment to act in such way as was consistent with the discharge of his duties. He therefore said to him: "I want to get an idea to you, but I don't want you to commit yourself—you needn't say a word. It might be well, however, to think along these lines"; and when the prosecuting attorney said to Mr. Smith, "What do you think about Miller's guilt?" the court immediately stopped him—as it might wear the complexion of something inquisitorial—and said "Mr. Smith is not here to be asked any questions, to make any statements or admissions." The court was simply attempting to show some way of safety to Mr. Smith, if his client was guilty and in any danger, and he left it to him to do as he wished without exposing his hand to any one.

I think that much that Mr. Smith claims in his affidavit, was, in substance, said. It is admitted that it was in the mind of the trial judge, and he might with entire propriety have expressed it, and it seems to have been along the line of his thought. He thinks, however, he did not say anything further than this: "Mr. Smith, this inquiry has been running through my mind as I have heard the case tried. These men have been indicted by the grand jury, and I have listened to the state's side of the case, and, of course, I don't know anything about what your proof will be. It might completely answer the case of the state—it may not answer it at all. It will have to be a pretty strong case, in my judgment, to answer the case that the state has made. The inquiry has been running through my mind, if this combination was formed as testified to by the witnesses on the part of the state—the inquiry has been running through my mind, why don't they abandon the whole thing, restore conditions; and I have simply called you in to make this inquiry; you can answer it or not, or you can answer it later or not as you wish; but I have thought of whether it might be practicable to bring about this result and I want to say to you that even if it were practicable, I do not wish the inquiry to indicate any line

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of action that I might take with reference to the cases even if it were done."

Smith then said that he wished to talk with his associates before he said anything, and that he might talk with the prosecuting attorney. It was properly suggested that it should be kept secret; and the reason is plain, for if the jury got the idea that there was some talk of surrender on the part of the defendant, it would be most damaging to his defense. The situation was called to the attention of counsel by way of admonition; it was proper, and evidenced an appreciation on the part of the trial judge of the delicacy which the administration of public justice demands at his hands. Mr. Smith thinks and makes affidavit, that the judge went so far as to suggest that none of the indicted parties could or should be allowed to testify; that if they did not testify they would probably be found guilty, and that if they did testify and the jury convicted, there might be a disagreeable necessity for a further inquiry—hinting at an investigation of perjury by the defendants.

I have this to say: That a judge who would so impose upon a defendant or his counsel, should resign his office. But it is so unreasonable and is shown by the context to be so far from the truth, that the court refrains from saying that it is willfully false by the consciousness that Mr. Smith at the time was in that position of uncertainty as to what was best to do, that his mind was in no condition to receive what the court said on the subject of the strength of the state's case, without distorting it and mixing his own impressions with what was said. He feared that his client was in danger of conviction; he was analyzing in his mind whether he could safely put Miller upon the stand, and when the trial judge called his attention to the fact that the state had made a pretty strong case, he received the impression that it was unwise to put his client on the stand and he has confused that with saying that the court admonished him that he must not put him on the stand.

It is unreasonable that a court would guard him against saying anything that might be embarrassing, to stop the prosecuting attorney from even asking him an opinion about the merits of the case, and at the same time prejudge the matter and tell him

that his client must not exercise his constitutional right of testifying in his own defense. I believe that Mr. Smith has confused his fears and what he thought he had better not do with the words of the judge; I prefer this to thinking that he has intentionally sworn false; but that it is false, in words and in spirit, is clearly shown. The judge even took the pains to say that if he acted in any manner upon the suggestions made, he must not consider it as indicating anything the court would do by way of punishment. Smith, of course, communicated this to Brown, who immediately saw that it could lead only to unconditional surrender. Brown knew that he must not attempt to bargain with the court; neither did he have the disposition to wish to do so, for he had before that observed the ethics of the profession to such an extent as to abandon a purpose to even see the judge.

The trial judge, in suggesting this idea to Smith's mind, did that which made it entirely proper for Brown to go and see him, and it was entirely proper that he should seek to find out what he could as to the consequences if they pleaded guilty. I am inclined to say that if he had not done so he would have been remiss in the discharge of his duty to his client. I think that Mr. Brown saw that it was liable to involve restitution to the customers from whom money had been extorted. He naturally wished to yield as little as possible and get as much in return as possible in the way of leniency. He knew that this suggestion came from the judge and not from the prosecutor. He therefore sought to rebuke the suggestion of undoing the wrong by whipping the judge over the prosecutor's shoulders; so he said: "Why, Wachenheimer can't fix prices; if he attempts that, we will have him indicted for violation of the law." And he went on to say that the men were justified in all they had done; that there had been an increase of expenditures and that nobody had done anything that was wrong, and they would show the whole thing to be correct and right when they got to the trial. The judge saw that the attitude of counsel was such that what he had suggested was not liable to be accepted kindly, and that anything further was liable to lead into embarrassment, and he immediately admonished Mr.

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Brown that he need not say anything further, and said to him that "There isn't any occasion for talking about this matter any further," and left the room.

Mr. Smith went forward with his defense; and later, very properly, sought to open further conversation along the same line that had been suggested to him by the court at the noon recess. The court's short interview with Mr. Brown had determined and closed the entire incident, and he said to Smith, "I do not care to discuss this thing any further at all; you may dismiss the whole matter and consider it as if nothing had been said about it."

This is the entire matter complained of. The conduct of every one in the case indicates that it was considered entirely abandoned. Even the associate counsel of Mr. Brown, who went with the parties into court and withdrew the plea of not guilty and pleaded guilty, says that before the sentence was pronounced he speculated with the prosecutor as to what probably the court would do, in which he suggested that he did not believe the court would impose a workhouse sentence, and that the prosecutor intimated that he wasn't so sure of that—meaning thereby that he was inclined to think they were expecting to get off easier than they were liable to. This is strong, almost conclusive, that there was nothing held out and that the defense did not think there was anything held out in the way of favor to be received; otherwise this conversation is unintelligible.

In a word, the situation was this: The defendants had learned that the court's idea was that if the defendants were guilty, it would be wise to stop the contest and do the proper thing by the way of restoration. They, therefore, within forty-eight hours before entering the plea of guilty, made a deduction of two dollars a ton to home consumers, threw themselves upon the mercy of the court and hoped for some leniency. They were not surprised by anything the court did unfairly; they were surprised at the court's severity. It was not that he had done some wrong, but that he had enforced the law with vigor and apparently with the intention to cut up root and branch the unlawful combination. They were chagrined that they had wrongfully anticipated the outcome. They should not have attacked the

court as they did. I wish, however, to say in this connection, that the counsel who were called in this emergency have acted in a manner entirely commendable in so far as the court can observe, and that in filing the charge made in the motion they might properly feel that they needed to characterize the conduct as a promise, lest otherwise it might be held that the grounds upon which they were claiming that the sentence should be set aside were not sufficient. I prefer to believe, and do believe, that it was filed under a belief that it was a proper thing for them to say and do, under the information they had, but I add that this information was entirely without foundation.

This principle is contended for, that it makes no difference who excited the hope or expectation in the minds of the prisoners of leniency, in case of pleading guilty, if the court shall find that they did have that expectation and were thereby led to withdraw their plea of not guilty and enter a plea of guilty. It is based upon the familiar doctrine that an extra-judicial confession will not be received in evidence in a criminal case, unless it is voluntarily made; and counsel contend, with a good deal of show of plausibility, that if a partial confession of guilt, induced by hope or fear excited in the mind of the prisoner by any one, is not to be considered as voluntary, then the confession in open court, induced by hope of leniency excited in the mind of the prisoner by anyone, ought to be equally protected. In case of an extra-judicial confession thus brought about, the ruling is that it shall not be received in evidence. The contention is that the same principle ought to obtain and the pleas of guilty which have been entered ought to be withdrawn. The rule as to extra-judicial confessions is exhaustively treated in *Spears v. State*, 2 O. S., 583, wherein the court says:

“The judge is to determine how the confession was produced by looking at the circumstances, among which are the strength or weakness of the prisoner’s intellect, his knowledge or ignorance. If satisfied that the confession was produced by representations or threats, the court can not receive it in evidence.
* * * The strongest mind is liable to be unhinged, and

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the question is not what the prisoner ought to have believed, but what did he believe."

It does not follow that the same rule safeguarding the prisoner's rights which applies to an extra-judicial confession should be employed in the case of a confession in court; in fact, the rule is otherwise. But, if it did apply, what would the court say in this case, under the rule which says that the court should look to the circumstances, the strength or weakness of the prisoner's intellect, his knowledge or ignorance? When one is suddenly accused of crime, taken into custody, threatened with the opening of prison doors, the heralding of the offense in all ears, the blasting of reputation, the court properly says: "In such instances the strongest mind is liable to be unhinged." Justice requires that a party thus circumstanced should be safeguarded, for he will catch at anything which looks like hope. Human nature is such that many times persons have been persuaded to plead guilty to things they were innocent of, for the apparent temporary rescue of themselves. Here intelligent, shrewd business men, flanked by great lawyers of the state, speculated for weeks as to what was the best thing to do; sought interviews with the prosecutor in season and out of season; went over the whole matter time and again, turned it over in every possible light and finally concluded to plead guilty and throw themselves upon the mercy of the court. It would be a strange doctrine if the rule safeguarding their rights should be that of one suddenly overwhelmed and in fright at the arrest and charge of crime.

The rule is universal that a person who has been indicted and who has pleaded not guilty may by leave of the court, on the advice of counsel or of his own motion, withdraw that plea and enter a plea of guilty; but it has long been held that where a defendant has pleaded guilty and sentence has been passed upon him, he can not retract his plea and plead not guilty. The English case announcing that a prisoner will not be permitted thus to do, is *Regina v. Tell*, 9 Car. & P., 346. The same doctrine is announced in *State v. Buck*, 59 Ia., 382; *Mastrodama v. State*, 60 Miss., 86. I call attention to the statement of the law as

made by eminent text-writers in criminal law. Says Bishop, in the New Criminal Procedure, Vol. 1, Sec. 789:

"In most of our courts, where leave to substitute not guilty is asked in a reasonable time, it is granted pretty nearly as of course. Even where, after a defendant has pleaded guilty, has moved an arrest of judgment and his motion has been overruled, the court, if justice requires, will allow a substitute of not guilty for guilty, but it is too late after sentence."

To the same effect is Wharton's Crim. Pl. & Pr., Sec. 441. It would be to trifle with courts of justice to permit parties to speculate on what the sentence will be, and when it is not satisfactory to say, "What I did was not voluntary, because I expected leniency, which I failed to receive."

Concerning the severity of this sentence and its wisdom I have nothing to suggest: First, because it is not within my province; second, because it would be discourteous to the judge who pronounced it. With its suspension or modification I have nothing to do.

It is therefore adjudged that each and every of the three motions be overruled.

L. W. Wachenheimer, Prosecuting Attorney, *Ralph Emery*, Assistant Prosecuting Attorney, *Henry W. Seney*, for the State.

King & Tracy, *Brown*, *Geddes*, *Schmettau & Williams*, *Smith & Beckwith*, and *Hamilton & Kirby*, for defendants.

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Insurance Co v. Railway Co.

FIRE RESULTING FROM NEGLIGENT OPERATION OF RAILWAY.

[Common Pleas Court of Franklin County.]

THE HOME INSURANCE COMPANY V. THE P., C., C. & ST. L. RAILWAY COMPANY.

Decided, April 17, 1906.

Fire Insurance—Pleading—Where Fire Resulted from Negligence of Railway—And Loss has been Paid by Insurance Company—Intervening Cause—Contributory Negligence of Intervenor—Concurrent Acts of Negligence—Averment that Railway has Paid Excess of Loss over Insurance.

1. In an action by an insurance company against a railroad company for recovery of the amount paid on a policy of insurance covering a building destroyed by fire through the alleged negligence of the railroad company, an averment that the owner of the property had complied with all the conditions of the insurance contract is a proper averment.
2. Where two acts of negligence are alleged and these unite in causing an injury, it is not a question of proximate or remote cause, but of a concurrence of two causes, for both of which the defendant may be responsible, and the one injured may allege and prove both if he can.
3. The pleading of facts is not open to objection in an action for negligence, where the pleader is thereby relieved from the necessity of pleading conclusions as to the concurrence of negligence or non-concurrence of contributory negligence.

BIGGER, J.

This is an action brought by the Home Insurance Company to recover from the defendant, the P., C., C. & St. L. Railway Company, for a fire loss paid by the plaintiff company to one Malissa Slain, for the loss by fire of a house adjoining the tracks of the defendant company in Montgomery county, this state, and which fire, it is alleged, was caused by the negligent acts of the defendant company, which are set forth in the petition. In substance the claim is that the company was negligent in maintaining an insecure railway crossing opposite the house in question, and that as one Babbitt was crossing the railway track with an oil wagon and was upon said crossing, his wagon wheel became fastened between the rail and the plank by reason of the distance being too great between said rail and plank, and that while thus

fastened upon the track an engine, in charge of an engineer in the defendant's employment, approached and negligently ran into the wagon, throwing its contents over the house which, becoming ignited from the fire in the engine, resulted in the total destruction of the house.

The defendant has interposed a motion asking that certain averments in the petition be stricken out as irrelevant and redundant.

First, it is asked that the averment that the owner of the house had complied with all the terms and conditions of the insurance policy upon her part to be performed be stricken out. This is clearly material because it is necessary for the plaintiff to allege and prove that the payment was not a voluntary payment, and that it was under legal compulsion to pay. Counsel for defendant seemed to admit in the reply memorandum that this may be necessary, but says it should be averred in issuable form, to-wit, that the plaintiff was obliged to pay, etc. But that would only be a conclusion of the pleader. The fact that she complied with all the terms and conditions of her contract, and that there was a loss by fire, and that plaintiff paid it, is the proper averment.

Defenses two and three of the motion ask that the averments concerning the negligence of the defendant in maintaining a crossing be stricken out. The claim upon this point is that the negligence of the defendant, if there be any, was that of the engineer in not bringing his train to a stop. But plaintiff is not compelled to rely upon one act of negligence of the defendant alone. If more than one act of negligence on the part of the defendant concurred in causing an injury, the plaintiff may allege such concurring acts of negligence. It is a familiar principle in the law of negligence, that where an injury results from the concurrence of two causes, for one of which the defendant is responsible, but not for the other, the defendant can not escape liability. It is equally true that if the defendant is responsible for each of which the defendant is responsible.

"Whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequences may be immediately and

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directly brought about by intervening causes, if such intervening causes were set in motion by the original wrongdoer." Black on the Law and Practice in Accident Cases and cases cited.

If the crossing had not been negligently maintained so as to entrap the wagon, the engine could not have done any injury, even if the engineer was not looking. On the other hand, the negligence at the crossing causing the wagon to be fastened might not have caused an injury, if the engineer had been exercising proper care. But where the defendant was responsible legally for both negligent acts, and they unite in causing the injury, there is no doubt about the right of the person injured to allege and prove both, if he can. It is not a question of proximate or remote cause, but a question of concurrence of causes, for both of which the defendant is responsible.

Branches four, five, six, seven and eight are treated together in the brief of defendant's counsel, and it is claimed they should not be stricken out as evidential matter. Most of this matter has relation to the conduct of said Babbitt after his wagon became fastened on the track, and it is said this is purely evidential. Counsel have not argued the question as to whether or not it is necessary for the plaintiff to allege and prove facts showing that Babbitt was not guilty of contributory negligence. If it is, then the pleader ought to state the facts as to his conduct—that is what he did, and not the conclusion of the pleader that he was free from contributory negligence. But if this is not necessary, still these are facts which I think it proper to plead upon the question of negligence of the engineer himself. An engineer who sees a wagon approaching or upon a railroad crossing, has ordinarily a right to assume that the wagon will move on across, and out of harm's way, and although he might see it plainly for a long distance as is here stated it was possible to do in this case, yet he would not ordinarily be negligent for not bringing his engine at once under control, but if the wagon be fastened upon the track and the driver be running towards the engine, as is alleged here, and flagging the engine, his conduct in approaching without bringing his train under control would present an altogether different question. Now, in pleading negligence, it is necessary to plead facts, and not conclusions, and I think whether it is neces-

sary for the plaintiff to aver facts to show the freedom of Babbitt from contributory negligence, it is proper to plead these facts upon the question of the negligence of the engineer.

There may be some repetition in the petition here in nine and ten, but it is not every case of redundancy which necessitates an amendment. Section 5115 of the Revised Statutes requires the court at every stage of a proceeding to disregard any error or defect in pleadings or proceedings which do not affect the substantial rights of the adverse party.

I am of opinion that the last branch of the motion which asks that the averment concerning payment of the excess of the value of the property to the owner be stricken out, should be overruled. If the assured has any interest or his whole loss was not paid he is a necessary party. Clement on Insurance, p. 369. From the averments of the petition it appears her loss was greater than the plaintiffs claim, hence the necessity of this averment to explain the absence of one who could otherwise be a necessary party. It would certainly appear on the trial that the loss was greater than plaintiff's claim, and put it in defendant's power to defeat the action for want of necessary parties.

The amendment may be made under the rule.

J. W. Mooney, for plaintiff.

Henderson, Livesay & Burr, for defendant.

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FIRE INSURANCE AND THE ANTI-TRUST LAW.

[Common Pleas Court of Ashtabula County.]

STATE, EX REL TAYLOR, PROSECUTING ATTORNEY, v. ALBERT
ROSS ET AL.

Decided, May 5, 1906.

*Monopoly—Restrictions and Agreements by Fire Insurance Agents—In
Contravention of the Valentine Anti-trust Law—Words and
Phrases—Criminal Law.*

The provisions of the Valentine Anti-trust law include the business of fire insurance, and an indictment which charges the defendants with unlawfully conspiring, combining and agreeing together to restrict the "trade, business and commerce of insuring property," and to fix and increase the premiums therefor and prevent competition, charges a crime under the laws of Ohio.

ROBERTS, J.; METCALF, J., concurs.

Heard on demurrer to indictment.

The grand jury returned an indictment against Albert Ross and twenty-eight others, the first count of which charges that they—

"on the thirtieth day of December, in the year of our Lord nineteen hundred and three, with force and arms, in said county of Ashtabula and state of Ohio, unlawfully did conspire, combine, confederate, and agree together, to create and carry out restrictions in the trade, business, and commerce of insuring property against loss and damage by fire, lightning, and tornado; and to increase the price of such insurance and to prevent competition in the making, sale, and purchase of such insurance; and to fix the price, premium, and rate of such insurance at a standard and figure whereby its price to the public and to the consumer shall be established and controlled; and to make, enter into, execute, and carry out contracts, obligations, and agreements to keep the price of such insurance at a graduated figure, to not sell or dispose of such insurance below a common standard and fixed value, to establish and settle the price of such insurance between themselves and between themselves and others so as to preclude a free and unrestricted competition among themselves in the sale thereof, and to pool, combine, and unite their interests in the sale of such insurance so as to effect the price thereof" and they

"then and there unlawfully acted with, were members of, and aided in carrying out the purposes of an unlawful trust and combination known as Ashtabula County Underwriters' Association, then and there being and existing for each and all of the aforesaid purposes and which said trust and combination did then and there unlawfully effect and accomplish each and all of the aforesaid purposes, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Ohio."

The second and third counts differ from the first count only in alleging different dates. To this indictment the defendants, Albert Ross and Isaac Hewitt, have demurred severally, and all other defendants jointly. The demurrers are alike and allege the following reasons:

"First. The facts stated and alleged in the said first, second and third counts in said indictment do not constitute, in either of said counts, an offense punishable by the laws of the state of Ohio.

"Second. That the facts stated and alleged in the first, second and third counts in said indictment, are not sufficient in either of said counts, to constitute an offense or crime under the laws of the state of Ohio.

"Third. The facts stated and alleged in said first, second and third counts in said indictment do not constitute in either of said counts, an offense punishable under Chapter 19 A, entitled 'trusts,' of the Revised Statutes of Ohio.

"Fourth. The intent is not alleged in either the first, second or third counts of said indictment and proof of such intent is necessary to make out the offense charged."

This indictment was intended to be based upon the Stewart-Valentine Anti-trust law, so-called, and is found in 93 O. L., 13 (Revised Stat. 4427-1). The law, so far as pertinent in this consideration, reads as follows:

"An act to define a trust and to provide for criminal penalties and civil damages, and punishment of corporations, persons, firms and associations, or persons connected with them, and to promote free competition in commerce and all classes of business in the state.

"Section 1. Be it enacted by the General Assembly of the state of Ohio, that a trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or association of persons or of any two or more of them for either any or all of the following purposes:

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- "1. To create or carry out restrictions in trade or commerce.
- "2. To limit or reduce the production, or increase, or reduce the price of merchandise or any commodity.
- "3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.
- "4. To fix at any standard or figure whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state.
- "5. To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between them or themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves or any purchasers or consumers in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. Every such trust as is defined herein is declared to be unlawful, against public policy and void."

The questions involved in the consideration of these demurrers have been learnedly and exhaustively argued by counsel for the state and for the defendants, both orally and by briefs submitted, even to the extent of going beyond the legal propositions before the court and embracing a discussion concerning the business of fire insurance generally, its purposes, its methods and its profits, which makes it proper to remark that in a consideration of these demurrers the court has nothing to do with the guilt or innocence of the defendants, with the manner of doing business by insurance companies, or agents, their designs or acts, or with the facts whatever they may be, embraced in the transactions alleged in the indictments.

The demurrers admit the truth of the allegations of the indictment, and considering them true, say that they do not

constitute an offense under or punishable by, the laws of Ohio, and that they do not constitute an offense under the provisions of the Stewart-Valentine law. In other words, and briefly stated, the issue is whether the business of insurance is included in, or provided for, in said law. If it is not, the demurrers should be sustained.

It will be observed that specific kinds of business are not enumerated in the law and it is claimed by the state that insurance is included in "trade," "commerce" and "commodity," mentioned in the law. The problem to be solved is whether these terms, or any of them, by proper definition and by rightful construction of the law, include insurance.

Recourse to the definitions of lexicographers and of courts becomes necessary. Webster defines trade as follows:

1. The act or business of exchanging commodities by barter, the business of buying or selling for money.
2. The business which a person has learned and which he carries on for procuring subsistence or for profit, occupation, especially mechanical employment.
3. Business pursued, occupation, employment.

The definitions found in the Standard and Century Dictionaries are substantially the same. Bouvier says:

"*Trade*. In exemption laws it is usually confined to the occupation of a mechanic, but in its broader sense it is generally construed as equivalent to any occupation, employment, handicraft or business."

Anderson's Law Dictionary says:

"Trade, generally, equivalent to occupation, employment, or business whether manual or mercantile; any occupation, employment or business carried on for profit, gain or livelihood, not in the liberal arts or learned professions."

"The word 'trade' includes not only the business of exchanging commodities by barter, but the business of buying and selling for money, or commerce and traffic generally." *May v. Sloan*, 101 U. S., 231.

Story, J., said in *The Nymph*, 1 Sumn., 517:

"Wherever any occupation, employment, or business is carried on for the purpose of profit or gain, or a livelihood, not

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in the liberal arts or in the learned professions, it is constantly called a trade."

In this broader sense the word is used in *The Eliza*, 2 Gall., 4; *United States v. Brig Eliza*, 11 U. S., 113.

The business of a telegraph company was held to be a trade in 3 Exch. Div., 108.

In *Betz v. Maier*, 12 Tex. Civ. App., 219 (33 S. W. Rep., 710), it is said:

"The word 'trade' embraces within its meaning commercial traffic, and it also has a limited and restricted significance, which applies to mechanical pursuits; but, in its broad and general sense it covers and embraces all occupations in business, with the possible exception of the learned professions, and those that pertain to liberal arts and the pursuit of agriculture."

In this case it was held that the business of an insurance agent was included in the term "trade."

The word or term "commodity" is defined by Webster as, 1. Convenience; accommodation; profit; advantage; interest. 2. That which affords ease, convenience or advantage, especially in commerce, including everything that is bought and sold, goods, wares, merchandise.

In the Century Dictionary: 1. Accommodation; convenience; suitability. 2. Profit; advantage; interest. 3. That which is useful; anything that is useful, convenient or serviceable.

The definition in the Standard Dictionary is substantially the same.

Anderson's Law Dictionary, in addition to the definitions given, says that, "Commodity is a general term and includes the privilege and convenience of transacting a particular business."

8 Cyc., page 338. "Commodity. In its primary and most comprehensive sense, accommodation; advantage; benefit; commerce [convenience]; commodiousness; convenience; gain; interest; privilege profit; the privilege and convenience of transacting a particular business. In its secondary and commercial sense, that which affords advantage or profit; that which affords convenience or advantage, especially in commerce, including everything movable which is bought and sold; an article of trade or commerce, a movable article of value, something that is bought and sold; any movable and tangible thing that is

ordinarily produced or used as the subject of barter or sale; anything movable that is subject of trade or acquisition; articles of any kind; property; something produced for use, and an article of trade or commerce."

"In the general sense a commodity is something of convenience, advantage, benefit, or profit; and in a special sense a commodity is something produced for use as an article of trade or commerce. * * * The privilege of transmitting or receiving, by will or descent, property on the death of the owner is a 'commodity' within the meaning of this word in the Constitution of Massachusetts." *Minot v. Winthrop*, 162 Mass., 110 (38 N. E. Rep., 512).

"Commodity is a general term and includes the privilege and convenience of transacting a particular business." *Commonwealth v. Bank*, 123 Mass., 493.

"The primary meaning of the word commodity according to the lexicographers, is convenience, and its secondary meaning is that which affords convenience or advantage, especially in commerce, including everything which is bought and sold." *McKeon v. Wolf*, 77 Ill. App., 325.

"If regarded as meaning goods and wares only, there would be much difficulty in the case, but if it signifies 'convenience, privilege, profits, and gains,' as uniformly held by the state court, then all difficulty vanishes, and the case is clear." *Hamilton Mfg. Co v. Massachusetts*, 73 U. S., 632.

"Commodity is a general term and includes the privilege and convenience of transacting a particular business." *Portland Bank v. Apthorp*, 12 Mass., 252, 256.

Commerce is defined by Webster as being: "The exchange of merchandise on a large scale between different places or communities."

Anderson's Law Dictionary quotes from *Gibbons v. Ogden*, 22 U. S., 1, as follows:

"In its simplest signification an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange become commodities and enter into commerce. A term of the wildest comprehending intercourse for the purpose of trade in any and all its forms."

It was said by Marshall, C. J., in *Gibbons v. Ogden*, *supra*:

"Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse be-

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tween nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

In this case it was held that commerce included navigation

In *Leloup v. Mobile*, 127 U. S., 640, it is held that communication by telegraph is commerce

In Black's Law Dictionary, it is said to the effect that commerce includes the various agreements which have for their object, facilitating the exchange of the products of the earth or the industry of man, with an intent to realize a profit.

From the recognized and well settled definitions and meanings of the words "trade," "commodity" and "commerce" as given by lexicographers, as established by courts and sanctioned and approved by long and general usage, it follows that these words could properly have been used in a sense broad enough to include fire insurance, by the Legislature, in the law under consideration, and that the words are susceptible of such definition as will include and cover fire insurance.

The question now for determination is whether these words were used by the Legislature in such broad and general sense under such circumstances, and with such other language in the act as requires or justifies a construction of the act, given to these words a meaning which includes fire insurance. Rules should be considered for the construing of the statute and to determine what should be considered in so doing.

"The intention of the lawmakers may be collected from the cause, or necessity of the act. * * * Every statute should be construed with a reference to its object, and the will of the lawmakers is best promoted by such a construction as secures that object, and excludes every other. * * * It being the duty of courts to give such a construction to statutes as will suppress the mischief, and advance the remedy." *Burgett v. Burgett*, 1 Ohio, 469, 482.

"In giving a construction to any statute, the court must consider its policy, and give it such interpretation as may appear best calculated to advance its object by effecting the design of the Legislature. The great object of the statute in question is clearly expressed in the title prefixed to it." *Wilber v. Paine*, 1 Ohio, 248-255.

"It is a rule of interpretation universally accepted, that in giving a construction to the statute a court will consider its

policy and the mischief to be remedied, and give it such an interpretation as appears best calculated to advance its object by effectuating the design of the Legislature. * * * It is equally well settled that where the Legislature has employed explicit and unambiguous terms to express its purpose and object, the ordinary meaning of such terms is to be adopted." *Davis v. Justice*, 31 Ohio St., 359, 367.

"It is a fundamental rule of construction, that the language of a statute is to be interpreted according to the sense in which the terms are employed and the plain intention of the Legislature. The great object of the rules and maxims of interpretation has been to discover the true intention of the law. * * * Regard must be had to the real object of the law, and the effect and substance of the subject-matter, and not barely to the nicety of form or circumstance. The reason, intent, and spirit of a law, therefore, must often prevail over the literal import of the terms employed." *Slater v. Cave*, 3 Ohio St., 80, 82.

"While, on the one hand, the judiciary should be careful not to make its office of expounding statutes a cloak for the exercise of legislative power, on the other hand it is equally bound not to stick in the mere letter of a law, but rather to seek for its reason and spirit in the mischief that required a remedy and the general scope of the legislation designed to effect it." *Tracy v. Card*, 2 Ohio St., 431.

"In construing statutes so as to give them the legislative intent, interpretation may expand their meaning beyond the literal significance of the words. In each case regard must be had to the subject and the circumstances, as well as to the words used." *Cincinnati Gas Light and Coke Co. v. Avondale*, 43 Ohio St., 257, 267.

"The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it. And where its provisions are ambiguous and its meaning doubtful, the history of legislation on the subject, and the consequences of a liberal interpretation of the language may be considered; punctuation may be changed or disregarded; words transposed, or those necessary to a clear understanding and, as shown by the context manifestly intended, inserted.

"But the intent of the lawmakers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the lawmaking body, there is no occasion to resort to other means of interpretation." *Slingluff v. Weaver*, 66 Ohio St., 621.

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“When the real design of a Legislature in ordaining a statute, although it be not precisely expressed, is yet plainly perceivable, or ascertained with reasonable certainty, the language of the statute must be given such a construction as will carry that design into effect, even though in so doing the exact letter of the law be sacrificed, or although the construction be, indeed, contrary to the latter.” *Logan Nat. Gas & Fuel Co. v. Chillicothe*, 65 Ohio St., 186, 206.

Rules applying directly to criminal cases will now be cited. In *Woodworth v. State*, 26 Ohio St., 196, 198, which was a case from this county, the Supreme Court said:

“The rule requiring the strict construction of a penal statute, as against the prisoner, is not violated by giving every word of the statute its full meaning, unless restrained by the context. * * * It is not intended, however, to ignore the rule which requires penal statutes, as against the prisoner, to be construed strictly, and in his favor, liberally. But it does prevent a construction, as against him, so strict, or, in his favor, so liberal, as to defeat the obvious intention of the Legislature.”

Again, in *Barker v. State*, 69 Ohio St., 68, 74, it is said:

“We are quite aware that the rule of law and of this court is that a statute defining an offense is not to be extended by construction to persons not within its descriptive terms, yet it is just as well settled that penal provisions are to be fairly construed according to the expressed legislative intent, and mere verbal nicety, or forced construction, is not to be resorted to in order to exonerate persons plainly within the terms of the statute.”

The meaning of the words of the statute being doubtful and its provisions subject to ambiguity, it becomes a duty under the authorities cited to consider “the history of the legislation,” “the cause or necessity of the act,” “the object and will of the lawmakers,” and what “appears best calculated to best advance its object.”

This act was passed April 19, 1898, at a time when the great industrial and commercial interests of the country were being concentrated and united under single control; when syndicates and trusts were being formed to control, not only production, but transportation; when competition was being stifled, and the result of individual effort was failure. The necessities of life

were passing under the control of monopolies and the condition of the masses was becoming subject to the power of combined wealth. Widespread apprehension existed in the minds of the people as to the result of these conditions, and the efforts of well meaning legislators were being directed to the remedy of evil conditions; and the protection of the people. National legislation had resulted in the Sherman law, and various states had enacted anti-trust laws; the object of all which was to protect the people from unjust monopoly, and to promote free competition.

Insurance had become and was generally recognized as a necessity. As pertinently remarked by counsel for the defendants, "Its great growth has been within the last half century." The home of the poor man and the business investments of the rich are not safe without it. Business would not prosper except for its protection. Credit, perhaps the greatest factor of the various enterprises of civilized life, is dependent upon it. It has become and is universally recognized as a necessity of life, progress and prosperity. From its nature, its business is transacted by comparatively few companies of great wealth, and thus its becoming a trust, as defined by the statute, was of comparatively easy accomplishment, and the danger to be apprehended correspondingly great.

Considering the "history of legislation" and the "necessity of the act," it seems incredible that the Legislature in adopting this law should have considered and intended only to include and provide against restrictions in trade or commerce, and the control of the price or production of commodities in the narrow and restricted sense of articles of trade and barter of goods, wares and merchandise.

Is it reasonable that the Legislature intended to prevent monopoly in practically all classes of business except fire insurance? Did it intend to give to that business a special privilege and immunity?

It is not to be presumed that favoritism was intended. The title of the act, which is declaratory of its object, says that it is "to promote free competition in commerce and all classes of business in the state." That fire insurance is a business will not be seriously contended.

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To what extent may the title of the act be considered for a construction of the act?

Section 16, Article II of the Constitution of the state of Ohio, provides that "No bill shall contain more than one subject, which shall be clearly expressed in its title."

"It (the title) is one of the indices pointing, feebly it may be, to the legislative intent." *State v. Pugh*, 43 Ohio St., 98. It follows that to the full extent that we may rely upon the title of this act to determine its meaning, it must be said that it was intended to and does include insurance.

"The title is framed in the same manner as the bill, and is sanctioned by the vote of both branches of the Legislature; we may therefore consider it as explanatory of the object of the law." *Burgett v. Burgett*, 1 Ohio, 469-480.

"In trying to determine what the object of the words of a statute are, we are authorized to look at its title." *Bronson v. Oberlin*, 41 Ohio St., 476, 483.

It was held by the Supreme Court of Mississippi, in *American Fire Insurance Co v. State*, 75 Miss., 24 (22 So. Rep., 99), that a statute providing against combinations "of business" in those words, included fire insurance.

It is said, *Pinkney, In re*, 47 Kan., 89 (27 Pac. Rep., 179):

"The question presented is, does the word 'trade,' used in the title, fairly indicate and include the provisions of the act with reference to insurance? It is argued that the usual meaning of the word should govern, and in that sense it has reference to the business of selling or exchanging some tangible substance or commodity for money, or the business of dealing by way of sale or exchange in commodities; and it is said that the use of the word in connection with that of 'products,' in the title qualifies the meaning of 'trade,' and makes it all the more apparent that the construction contended for is the correct one. This is the commercial sense of the word, and possibly may be the most common signification given to it; but it is not the only one, nor the most comprehensive meaning in which the word is properly used. In the broader sense, it is any occupation or business carried on for subsistence or profit. * * * The broader signification given to the word by most of the lexicographers would fairly embrace and cover the provision of the act with reference to the business of insurance. The title prefixed to an act may be broad and general, or it may be narrow and restricted, but in either event it must be a fair index of the provisions of the act; that is, the subject of the act must be clearly expressed by the title."

In *State v. Phipps*, 50 Kan., 609 (31 Pac. Rep., 1097), it was again held that insurance comes within the purview of "trade."

The statute of Iowa provided against combinations "to regulate or fix the price of oil, lumber, coal, flour, provisions or any other commodity or article whatever," and the Supreme Court of Iowa in *Beechley v. Mulville*, 102 Iowa, 602 (70 N. W. Rep., 107), held that "insurance companies and a compact to charge uniform rates" was included in "any other commodity." The court said:

"It is thought by appellants that such statute has no application to insurance companies, but the only reason assigned for it is that the same subject has been before each successive Legislature since the act passed, and no one has thought that the act referred to such companies. However that may be, we have no doubt of its application to insurance companies because of the language of the act. There is a manifest purpose to make the section comprehensive as to the subject-matter, as well as to persons, both natural and artificial, coming within its prohibitions. It prohibits combinations to fix the price of oil, lumber, coal, grain, flour, provisions, or any other commodity or article whatever. Insurance is a commodity. 'Commodity' is defined to be that which affords advantage or profit. Mr. Anderson, in his Law Dictionary, defines the word as 'convenience, privilege, profit, gain; popularly, goods, wares, merchandise.' We see no reason why, in the act, the word should be restricted to its popular use. It is common to speak of 'selling insurance.' It is a term used in insurance business, and law writers have, to quite an extent, adopted it. Again, there are the same reasons why it should be protected against combinations as there are in matters clearly within the provisions of the law. The district court instructed the jury that the combination was prohibited by the act in question, and we think the holding was right."

In the case of *Metzger v. Adams*, 28 Ins. L. Jo., 176 (Ind.), it is said:

"No good reason has been given that will hold insurance exceptional, and accord to it a support that is denied to every other branch of industry. Business and law regard insurance as a commodity on the market, to be purchased as any other property, or beneficial interest."

Revised Statutes, 6969, and *Doll v. State*, 45 Ohio St., 445, 446, construing that section, speak of purchasing fire insurance.

In *Paul v. Virginia*, 75 U. S., 168, the restricted definition of commerce was applied to insurance and insurance contracts were

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said not to be commodities to be shipped from one state to another.

This decision was followed in several others in the same court, but the subject under consideration was interstate commerce, and insurance has been frequently held not subject thereto.

It may be proper to remark that this rule was laid down many years ago, and insurance occupies a much more important position than then, and there has been much recent discussion to the effect that insurance should now be subject to interstate commerce.

In 1889 the state of Texas enacted what was perhaps the first anti-trust law of the states. In 1893 the Supreme Court of Texas in *Queen Ins. Co. v. State*, 86 Tex., 250 (24 S. W. Rep., 397), held that the law did not apply to insurance. In 1895 the Legislature of Texas enacted a second anti-trust law broadening its terms apparently for the purpose of including therein the subject of insurance.

The argument of counsel for the defendants is largely an effort to show that the Legislature of Ohio at the time of the passage of the law under consideration had before it the original Texas law, the decision of the Texas court and the amended Texas law, and that a comparison of the three laws indicates that our Legislature followed the original Texas law. That by a rule of construction recognized in Ohio, when the Legislature of our state adopts legislation from another state, which has been construed by a court of last resort in that state, there is a presumption (not conclusive however), that it does so with the construction that has been so given it.

Taking into consideration the evils productive of the law, the purpose of suppressing the mischief and of advancing the remedy, in connection with the suggestion that the Legislature had its attention directly called to the subject of insurance, by considering the first Texas law from which it was omitted, the Texas decision so holding and the second law so drafted as to include insurance, it seems to be extremely improbable that the Ohio Legislature should have purposely followed a statute which excluded insurance and which had been found deficient as shown by the subsequent legislation in the pioneer state of anti-trust laws. With due deference to the careful analysis and compari-

son of these laws by counsel for the defendants, in arguing that original Texas law was followed, it is not thought that the comparison warrants this conclusion.

The original Texas law in section one, subdivision first, read as follows: "To create or carry out restrictions in trade." This was amended so as to include insurance, and to read, "To create or carry out restrictions in trade or commerce, or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of the state."

It was held in *Queen Ins. Co. v. State, supra*, "that the words in the first subdivision of section one, of the act, 'to create or carry out restrictions in trade,' were intended only as a general expression of the purpose of the law." This is the subdivision changed to include insurance and in our statute the words, "all classes of business," were inserted in the title as expressive of the purpose of the law.

In the Ohio statute, subdivision one, of section one, is constituted a separate offense, as held in *State v. Gage*, 72 Ohio St., 210. This suggests the thought that our Legislature intended to include insurance, and the words bringing it in, as found in the Texas act, being where the court said was expressive of the purpose of the law, prompted their insertion in a corresponding place in the Ohio law, viz., the title.

It is said in a Texas decision:

"It is true that while trusts are defined in the first section, nowhere either in that or any other section are they expressly declared unlawful. * * * There is no express declaration that trusts are unlawful—the acts which are declared to constitute a trust are not expressly made punishable, nor is any act expressly declared to be a violation of the provisions of the statute."

That the Ohio law had before it the Texas decision and intended to remedy the defect suggested, and not to follow the original act, is apparent from the insertion in the Ohio law, in section one, subdivision five, the following provision: "Every such trust as defined herein is declared to be unlawful, against public policy and void.

Subdivision first, section one, Texas act of 1889, reads, "To create or carry out restrictions in trade." In the Texas act of

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1895, to these words "or commerce" is added, and they are also found in section one, subdivision one of the Ohio law, thus indicating that the second Texas law was followed.

It is said in *Bloom v. Richards*, 2 Ohio St., 387, 402, "It is a general presumption that every word in a statute was inserted for some purpose. Mere idle and useless repetitions of meaning are not to be supposed, if it can be fairly avoided." The insertion of the words "or commerce" after "trade" means something, and if "trade" be used in the narrow sense, then "commerce" should be accorded a more general definition, more in consonance with the meaning urged by counsel for the state. While it can be readily believed that the Legislature had before it both Texas acts, and that it drew for material from both, it is not apparent from comparison, that the Ohio law was taken from the original Texas law, with the intention of excluding insurance.

It is urged by counsel for the defendants that Rev. Stat. 3659, the anti-compact law, having been amended since the enacting of the Stewart-Valentine law, which is said not to include associations of agents, and not having had inserted therein provision such as is contended for in the Stewart-Valentine law, is reason to support the claim that the Legislature did not intend to include insurance. With as much reason it may be said that the Legislature understanding that insurance was in the Stewart-Valentine law, did not therefore perceive any reason for inserting it in the anti-compact law, when amended.

The decision in *Queen Ins. Co. v. State*, *supra*, was largely based upon the provisions of the penal code of Texas, which have no application in this state, it being provided in the penal code that no person shall be punished for an act which is not made a penal offense, and the fact has been heretofore mentioned that the original Texas act did not expressly declare trusts to be unlawful. That code also provides for a strict construction of penal laws.

Further, the Texas decision held that under the terms of the original act providing against restraints of trade, many contracts and conditions of business would be punishable which are proper and necessary in the affairs of life; that no distinction is made between what is reasonable and proper and what is

unreasonable and improper, which considerations seem to have largely influenced the court.

In *State v. Gage*, 72 Ohio St., 210, it was urged that the Stewart-Valentine law was void because its terms do not except from its prohibitions, contracts, acts and transactions which are protected by the Constitution; but the court held that the case offered no opportunity for the application of a rule that when an act contains an indivisible prohibition, whose terms include contracts which the Legislature is powerless to prohibit, the courts can not save the act by restricting the natural and obvious meaning of its terms. Thus it will be observed that the Supreme Court of Ohio and the Supreme Court of Texas construe this anti-trust legislation along widely diverging lines.

Runk v. Cloud, 8 N. P., 448, is cited as authority that insurance is not to be considered in the act and the court in that case so held. In so deciding the court assumes that the statute is "a literal copy" of the Texas act, which counsel for defendants do not claim it to be, and then the court proceeds to adopt the argument of the Texas court. If it be not true that our statute was borrowed from the Texas act of 1889, then the foundation on which the case of *Runk v. Cloud*, *supra*, rests is destroyed. In this decision it is said: "Our Legislature very evidently then to avoid this ambiguity in our statute added on the word 'commerce,' to trade, as a synonym or equivalent and not by way of contrast." This is a plain violation of the rule of construction laid down in *Bloom v. Richards*, 2 Ohio St., 387, 402, that, "It is a general presumption that every word in a statute was inserted for some purpose."

This discussion further argues that all classes of business should be constructed to mean all classes of business devoted to commerce, otherwise it is said if it is given a larger signification "embracing everything about which a person can be employed" it will include classes of unions and combinations recognized to be lawful, devoted to working men.

State v. Gage, *supra*, held that lawful business can be excluded from the act and it still remain constitutional and operative. The decision seems to have been framed to avoid a danger said by our Supreme Court not to exist.

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The effort of the court to restrict the meaning of "all classes of business" to the same class as commerce, by an application of the rule *ejusdem generis*, that when general words follow an enumeration of particular cases, such general words are held to apply to cases of the same kind as those which are expressly mentioned, is not warranted. It is generally held to be the law, that this rule does not apply when the particular precedent words exhaust a whole genus; in which case the general term is held to refer to a larger class. *McKeon v. Wolf*, 77 Ill. App., 325; 23 Am. & Eng. Enc. of Law (1st Ed.), 442; Sutherland, Stat. Constr., Sections 278-279; *Woodworth v. State*, 26 Ohio St., 196.

The word "commerce" is a generic word, the name of a whole class, and under the rule of the Illinois court and other authorities, "all classes of business" must be used in a more comprehensive sense.

It is held by the Supreme Court of Ohio, that "it is essential to validity of an act undertaking to regulate the business that it shall in its requirements operate equally"; and that, "Our Bill of Rights prohibits the granting of privileges to one which are denied to others of the same class, and the imposition of restrictions or burdens upon certain citizens from which others of the same class are exempt, and Sec. 26 of Art. II of the Constitution requires that all laws of a general nature shall have a uniform operation throughout the state." *State v. Gardner*, 58 Ohio St., 599.

The Stewart-Valentine law having been held valid in *State v. Gage*, *supra*, if the terms "trade," "commerce" and "commodity," properly defined, include insurance, then insurance must be held to be within the statute.

The Iowa case of *Beechley v. Mulville*, *supra*, which held that insurance is a commodity, is cited with evident approval by the Supreme Court of the United States in *Carroll v. Greenwich Ins. Co.*, decided November 27, 1905. In a concurring opinion by Justice Harlan in that case, he said:

"The business of fire insurance is of such a peculiar character, so intimately connected with the prosperity of the whole community, and so vital to the security of property owners, that it is competent for the state to forbid combinations and

agreements among fire insurance companies doing business within its limits, in reference to rates, agents, commissions and the manner of doing their business."

The fourth ground of the demurrer that intent is not alleged in the indictment, has not been argued, and it is understood that nothing is now claimed for it.

The issues presented by the demurrers have been considered in conjunction with Judge Metcalf, who concurs in the conclusions herein made, and in the finding that the demurrers should be overruled.

C. L. Taylor and H. C. Starkey, for plaintiff.

T. E. Hoyt, A. M. Cox and H. B. Arnold, for defendant.

OWNERSHIP OF FUNDS BEQUEATHED FOR THE BENEFIT OF COUNTY INFIRMARY INMATES.

[Common Pleas Court of Lorain County.]

STATE OF OHIO V. H. H. FORBES AND W. C. PRINDLE.*

Decided, May 8, 1906.

Criminal Law—Allegations as to Ownership—Under a Charge of Embezzlement—Devise to Directors of County Infirmary—For Benefit of Inmates of Infirmary.

Funds were bequeathed as follows, to-wit: "All the rest and residue of my estate, I give, devise and bequeath to the directors in trust and their successors in office of the Lorain County Infirmary, to be used by them to the best interests in caring for the poor and inmates of said infirmary."

Held: That said funds did not become the property of Lorain county, and that an indictment which set forth the above bequest, and charged the infirmary directors with embezzlement of said funds as funds of Lorain county, did not properly allege ownership of the property, and that a demurrer to such indictment should be sustained.

WASHBURN, J.

Heard on demurrer to indictments.

In these indictments the defendants are indicted for converting to their own use \$100 of a certain fund, which all of the

*Leave to file petition in error refused by the Supreme Court.

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counts in the indictments charge was the property of Lorain county.

There are thirteen counts in all in both indictments, but they all refer to the same \$100, the offense being charged in different ways. In ten of the thirteen counts the fund is charged as being the property of Lorain county, by virtue of a bequest, which was in the words and figures following, to-wit:

“(10.) All the rest and residue of my estate, I give, devise and bequeath to the directors in trust and their successors in office of the Lorain County Infirmary, to be used by them to the best interests in caring for the poor and inmates of said infirmary.”

The other three counts of the indictment charge said fund as being the property of Lorain county; but do not set forth how it became the property of Lorain county, whether by taxation, by bequest or otherwise.

The matter is submitted to the court upon a demurrer to each count of the indictment.

“An indictment or information for embezzlement must show the ownership of the property alleged to have been embezzled with the same particularity as in a prosecution for larceny.” 15 Cyc., page 517.

“Ownership must be alleged, and with the same accuracy and after the same rules as a common law larceny.” 2d Bishop’s New Criminal Procedure, Sec. 320.

In the 18th O. S., page 497, referring to the law of Ohio in reference to embezzlement, the court say:

“In an indictment under that act, it is sufficient to allege that the money embezzled was public money belonging to the several municipalities named in the act, or to one or more of them, without stating the respective amounts belonging to each.”

Thus recognizing the principle as laid down in the authorities cited above, that in an indictment for embezzlement the ownership of the thing embezzled must be set out in the indictment.

Now as I have said, in all of the counts of these indictments, the property is alleged to be the property of Lorain county, and in ten of them the bequest by which it is claimed the ownership of the fund is shown to be in the county of Lorain is set out.

It is claimed on the part of the defendants that this bequest, which is set forth in the indictment, establishes the fact as a matter of law, that the property claimed to have been embezzled was not the property of Lorain county.

It is claimed by the defendants and is conceded by the prosecuting attorney, that there is no law in the state of Ohio, which enables the board of infirmity directors to accept a bequest like this on behalf of the public; of course they may accept it as individuals the same as any other individual might accept such a trust.

As bearing upon whether this is the property of Lorain county, a case in the 39th O. S., at page 153, is very important. That was a devise to the trustees of Marion township, Allen county, Ohio. And the law was then and is now, that the trustees of a township have authority to receive such bequests for the benefit of the poor; but the bequest in that case was not to the township; it was "to the trustees of Marion township, and their successors perpetually, for the exclusive benefit of the poor of the township."

And they were given authority to manage the trust, "as they think best for the benefit of said poor."

And it was held in that case, notwithstanding the fact that the trustees had authority to receive such a bequest, that it did not become the property of the township, but was to be held by the trustees, and managed by them as they should think best for the benefit of the poor.

If it had been devised to the township then it would have been township property, and the trustees would have had to handle the property under the law governing the property of the township, and in that event they could have loaned it out only upon mortgage security; they did loan it out without taking mortgage security, and the Supreme Court held that they had the authority to do so, because they took it as trustees and not as the property of the county.

If the trustees of the township in that case under that devise, when the law gave them authority to receive the property as property of the township, did not take it as such, it would seem to follow that in the case at bar, where the directors of the infirmity are not authorized by law to receive the property in

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question as the property of Lorain county, and where they are not named in the will by their official title, that the property in question was not the property of Lorain county, but was held by the directors as trustees to administer a charitable trust in accordance with the terms of the will creating such trust.

There is nothing in the will which says that the property in question was given to Lorain county, and there is no law permitting the infirmity directors as a board to take such property for Lorain county, even if such was the intention of the person who made the will.

The directors held the money as trustees, to use, not for the benefit of Lorain county, but for the benefit of the inmates of the infirmity, to provide said inmates with luxuries and things not furnished by the county, and not for the purpose of relieving the county of responsibility in the discharge of its duty to such inmates. It would have made no difference to Lorain county if the fund had been left to the president of the National Bank and his successors in office to administer; in that event the county would not have owned it.

If it was owned by Lorain county it should have been in the treasury of Lorain county. The infirmity directors had no authority to deposit in the bank money belonging to Lorain county; the treasury is the place provided by law for the deposit of the money of the county.

So it seems very plain to me that in these indictments they show upon their face that as a matter of law this property did not belong to Lorain county, and thus the allegation in those counts that the property belonged to Lorain county is nullified, and those counts are left the same as if no allegation of ownership was contained therein, and in that event they fail to state one of the essential things that should be stated in an indictment for embezzlement. And the demurrer to them should be sustained.

The demurrer will therefore be sustained on the ground indicated as to counts one and two in case number 2961, and as to counts one, two, three, four, five, six, seven and eight in the indictment number 2962.

In the first count of the indictment under 2961 and in the first, second, third, fourth and eighth counts of indictment num-

ber 2962, the allegation is that the fund embezzled was public property, the defendants "being charged" as public officers "with the receipt, safe-keeping and disbursement" thereof.

These counts are all drawn under Section 6841 of the Revised Statutes of Ohio, which applies only to public funds; all these counts showing on their face that the funds in question are not public funds, the demurrer as to those counts will be sustained also, on the ground that the defendants were not charged as public officers with the receipt, safe-keeping and disbursement of said fund.

The three last counts of indictment number 2962 do not, as I have stated, set forth how said fund became the property of Lorain county; but simply alleges that it is the property of Lorain county.

The court can not say on demurrer that the allegation in these three counts is untrue, and as the defendant, Forbes, in these three counts is charged with embezzlement as clerk, agent, employe and servant of the board of infirmary directors, and is charged with having converted to his own use money coming into his hands by virtue of his employment, these counts charge a crime under Section 6842, and the demurrer to them will be overruled.

F. M. Stevens, Prosecuting Attorney, for plaintiff.

Q. A. Gillmore, *A. E. Lawrence* and *Chamberlain & Hamlin*, for defendants.

PROSECUTION OF JUNK DEALERS.

[Common Pleas Court of Franklin County.]

PHILLIPS V. THE STATE OF OHIO.

Decided, June 30, 1906

Constitutional Law—Provisions of Section 4413—Not Unreasonable or Invalid—Regulation of Second Hand Goods Dealers—Discretion of Court in the Matter of Sentence.

1. The provisions of Section 4413 for the regulation of dealers in second-hand articles and junk dealers, requiring that certain goods purchased by them shall be kept on hand for thirty days, is not an unreasonable requirement and does not render the act unconstitutional on the ground that it is unreasonable.

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2. It is not open to a resident of the city, not accused under this act of failure to report to the mayor, to complain that the provision of the act requiring a report to the mayor is unconstitutional for lack of uniform operation, inasmuch as a dealer outside of the city limits could not be required to comply with this provision.
3. A fine of \$50 for failure to conform with the requirement as to the keeping on hand of goods for thirty days is not excessive or an abuse of discretion on the part of the trial court.

BIGGER, J.

This case is brought by the plaintiff upon petition in error to secure a reversal of the judgment of the police court of this city. The defendant below—the plaintiff in error here—was convicted of a violation of Section 4413 of the Revised Statutes, for the regulation of dealers in second-hand articles and junk dealers.

The specific charge against him in the affidavit is that he had violated the section by failure to keep on hand certain goods purchased by him for a period of thirty days, as required by the statute. The claim of the plaintiff in error is that this section of the statute is unconstitutional and void. If the statute is clearly and palpably unconstitutional, it is the duty of the court to so declare, but if not, then the rule requires the court to sustain the statute.

Our Supreme Court, in the case of *Marmet v. The State*, held that the General Assembly had power to regulate such occupations as junk dealers by the imposition of a license fee and to make such a failure to obtain a license penal, and this is upon the ground as announced in the syllabus that the General Assembly had power to make such regulations concerning any occupation which imposed special burdens on the public and was injurious or dangerous to the public. It is a well known fact that many unscrupulous persons have engaged in this business in collusion with thieves, who otherwise find it somewhat difficult to market their stolen goods. A dealer may be honest and have no such criminal connection with thieves, and yet his place furnish the only ready and easy means of disposing of stolen goods, and it would seem not unreasonable to impose some restrictions upon the business for this reason. The Supreme Court has held that that is legal. The restrictions, I think, if not unreasonably severe in themselves would not be

unconstitutional, and it is not clear that the requirement that the property shall be held for thirty days after its reception, so as to furnish an opportunity for the loser to make search for it and recover his goods, is an unreasonable requirement.

It is also said that the law is unconstitutional because it requires a report to the mayor of the city by junk dealers, which it is said can not apply to persons in the country and that, therefore, the law is not of uniform operation. It is a familiar principle that a law may be unconstitutional in part and the remainder of it constitutional and valid. The last clause in the act may be unconstitutional without affecting the remainder of the act, which is general, applying equally everywhere. The defendant is not accused of not reporting to the mayor. He can not, therefore, in my opinion, complain of that provision of the law which he has not been accused of violating, and where he has not been convicted of such violation. It is not, therefore, clear to me that this law is unconstitutional and void, and it is therefore the duty of the court to uphold it.

It is also suggested that the fine of fifty dollars imposed is unreasonable. Counsel does not make any contention in this behalf in his brief, and I can not say that this is so excessive as to call upon a reviewing court to interfere with that reasonable discretion which is imposed in trial courts.

The judgment of the police court must, therefore, be affirmed at the costs of the plaintiff in error.

C. D. Saviers, for plaintiff.

Charles Carter, for defendant.

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THE RIGHT OF PUBLIC TRIAL.

[Court of Common Pleas of Franklin County.]

HARRY FIELDS V. THE STATE OF OHIO.

Decided, May 14, 1906.

Public Trial—Rules of Court in Violation of Right of—Errors not Prejudicial—But Involving a Denial of Constitutional Rights—Expert Evidence as to the Game of "Craps"—Omission of Names of Africans from Jury Wheel.

1. A rule of court which excludes from the court room all of the world, except officers of the court, witnesses, certain relatives, newspaper men, and those having special permission from the court to enter, is in violation of the guarantee of a public trial found in Section 10 of Article I of the state Constitution.
2. The rule that errors occurring during a trial shall not be considered as ground for reversal of the resulting judgment, unless they are of such a character as to be material or prejudicial, is not applicable to an error involving the deprivation of a constitutional right; the law presumes in such a case that an injury has been suffered.
3. Expert evidence may properly be admitted in a criminal trial, where the charge is gambling by means of the game known as "craps."
4. However lightly and devoid of merit a court may regard a motion to set aside a verdict on the ground that the jury commissioners excluded from the wheel the names of all persons of the African race, such exclusion where made solely on account of race or color being a denial of the equal protection of the laws as vouchsafed in the Fourteenth Amendment, it is the duty of such court to grant a hearing on such motion.

DILLON, J.

The plaintiff in error was charged in the police court with gambling, tried before a jury, convicted and sentenced. He prosecutes error to this court.

After a demurrer had been filed and overruled to the affidavits, the cause was called for trial April 4, 1906. Before the commencement of the trial the defendant objected to the manner in which the same was about to be conducted, and continued his

objection at the conclusion of the trial, by reason of the following rules of the said police court:

“The following persons *only* shall be admitted to the lobby:
1. Officers of the police court. 2. Witnesses *under subpoena*.
3. Wife, mother, or father of prisoner, during trial. 4. Persons having special permission from the court. 5. Newspaper men.”

While the presumption is that the court enforces its own rules at its trials, and that, in the absence of a contrary showing, the same were in accordance therewith, the actual enforcement of this rule is further proven by numerous affidavits of friends of the accused who applied for admission and were refused. The plaintiff in error claims, therefore, that he was denied a public trial, in accordance with Section 10 of Article I, of the Constitution of this state. The question, therefore, is fairly presented as to whether or not the admission only of the persons limited in the rule is sufficient to grant the defendant a “public trial” within the meaning of the Constitution. By this rule it will at once be apparent that all the world was excluded from the trial except the officers of the court, the witnesses, and wife, mother, or father, newspaper men, and those persons who had special permission from the court.

My consideration of this question has led me to determine, without reserve, that this is not a public trial. Public trial is one to which any proper person may have admittance, providing there is reasonable room therefor. The rule, therefore, which excludes all the world but a certain designated few, unquestionably violates the provisions of the Constitution with respect to a public trial. The object of the rule, doubtless, is commendable, as being intended to exclude those young and tender in years, those habitues or loungers whose presence might keep out the friends of the one accused, and those who, by reason of their personal habits as to disease, cleanliness, etc., should be denied admission. Restriction of this kind, unquestionably, would be valid.

There is a dearth of decisions on the subject, for the reason, no doubt, that it has seldom happened that any restrictions have been made in this country which would permit of the question

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being raised. In our own state we have one decision, that of *Kirk v. The State*, 14 Ohio, 511, decided in 1846. In that case, the trial itself was public, and without restriction, but after the jury retired, the presiding judge, at the jury's request, went to their room and explained his charge again to them, in the absence of defendant and his attorney. So jealous was the Supreme Court of this guaranty of the Constitution of a public trial, that the case was reversed and the cause remanded for a new trial.

In the case of *The People v. Murray*, 89 Michigan, 276, that court decided, in 1891, that a public trial has not been granted the accused by reason of a rule which provided that the officer at the door of the court room should "see that the room is not over-crowded, but that all respectable citizens be admitted and have an opportunity to get in when they shall apply."

One of the reasons for so declaring this rather reasonably appearing rule to be invalid was that the persons applying were not personally known to the door-keeper and were not required to get certificates of character as to their respectability. It seems manifest, therefore, that a requirement that every one accused of crime shall have a public trial means that all the world may freely attend within the reasonable capacity of the court room, and that the only exclusion can be those of the classes such as I have before mentioned. To make a rule which admits simply a certain limited class and bars the whole world except those coming within that classification, is clearly a violation of this provision of our Constitution.

It is argued on behalf of the state that, as a matter of fact, the defendant had a fair, impartial trial, and that he was not prejudiced by reason of this error. I grant the contention, but I can not grant the conclusion which counsel for the state draw therefrom, that even though this error existed, there being no prejudice to the defendant in his trial, the judgment should be affirmed. It is true that generally speaking mere errors which occur at a trial should not be considered as grounds for reversing a judgment, unless those errors were such as were material and prejudicial. This court inclines to the view that sometimes our reviewing courts have lost sight of this principle and oft-

times purely on mere abstract theory, have found error and assumed too freely the duty of reversal, even though it be apparent that without such error the result of the trial would have been the same. But when one of the constitutional guaranties as to personal rights is involved, the law does not force upon the one so deprived to show that any actual injury has been suffered by him by such deprivation of his constitutional right, but on the other hand, on principle and on grounds of public policy, once it is shown that his constitutional right has been violated, the law will presume that he has suffered an injury. This public policy and principle are based upon the theory that in such a case the whole body politic suffers an injury when the constitutional safeguard enacted to protect the right of a citizen has been violated in the person of the humblest.

The second complaint made by the plaintiff in error is that expert evidence was received upon the subject of the gambling game known as "craps." Laymen who are called to serve as jurors are not presumed to be familiar with the various games of chance which are by law made unlawful, and therefore the subject is not one of such common occurrence as would preclude expert testimony. In all such cases the state has a right to call those who are familiar with such games to explain what acts are embraced in and constitute the particular game complained of. I find no error, therefore, by reason of the admission of such evidence.

The plaintiff further complains that the court erred in overruling his motion to set aside the finding and verdict for the reason that the jury commissioners had excluded from the wheel the names of all persons of the African race, for the sole reason that they were persons of that descent. The court overruled this motion and refused to grant the defendant below an opportunity to prove his claim as made in the motion. While this motion probably was viewed by the court below as wholly without merit, and while this court is not inclined to take seriously to the claim made, it is pertinent to observe that this question has been passed upon by the Supreme Court of the United States in a number of cases in which it has held the right of a defendant to be heard as to such claim. See *Virginia v. Rives*, 100 U. S., 313-323;

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In re Wood, 140 U. S., 278; also, the recent decision of the Supreme Court of the United States in the case of *Rufus Martin v. Texas*, decided February 13, 1906, in which the court hold that a discrimination against the negroes because of their race, in the selection of grand and petit jurors is forbidden by the Fourteenth Amendment to the Constitution of the United States, and that if one accused files his motion, and at the same time offers to prove by witnesses the truth of his claim so made, the court must hear it, and refusal to so hear the offered evidence is error. It is well settled, therefore, in this country, that whenever by any action of a state, whether made through its Legislature or through its courts, or through any of the executive or administrative officers thereof, it is made to appear that all persons of the African race are excluded from serving as jurors solely because of their race or color, the equal protection of the laws is denied contrary to the Fourteenth Amendment of the Constitution of the United States.

The judgment of the police court, therefore, is reversed, and the cause is remanded to that court with instructions to grant the plaintiff in error a new trial.

C. D. Saviers, for plaintiff in error.

EFFECT OF AMICABLE PARTITION ON INCHOATE DOWER.

[Common Pleas Court of Darke County.]

FLEMING, EXECUTOR, v. MORNINGSTAR.*

Decided, March 6, 1904.

Co-Tenancy and Partition—Mortgage—Vendor's Lien in Amicable Partition—Effect of Amicable Partition on Inchoate Dower of Wife of a Tenant in Common—Estates Ancestral and by Purchase—Priority.

In a case of amicable partition by mutual conveyances of unequal parts, a mortgage given by one tenant in common (his wife not joining) to another to equalize the allotments, is subordinate to the wife's inchoate right of dower in the undivided interest acquired

*Affirmed by the Circuit Court without report; Circuit Court affirmed by the Supreme Court, 72 O. S., 647.

by descent of such mortgagor in the purpart so allotted to him, but is superior to dower in the share acquired by purchase from the mortgagee.

ALLREAD, J.

The controverted question here is the claim of Mrs. J. H. Morningstar to dower in a fourteen-acre tract of land sold by the administrator as part of the estate of her late husband.

This tract with others constituted the W. H. Morningstar estate, which upon his death in 1886, descended to J. H. and Alice Morningstar (now Fleming) in equal moieties.

There was a mortgage upon certain of the tracts given by the ancestor, and which is known in this case as the "Walker" mortgage. J. H. and Alice Morningstar gave a mortgage also upon certain of the tracts, known as the "Bachman" mortgage. The fourteen-acre tract was not included in either mortgage.

On July 1, 1889, for the purpose of amicable partition, the tenants in common agreed upon a division of the several tracts of the W. H. Morningstar estate, and each tenant in common released by a quit-claim deed the undivided half of the tracts allotted in severalty to the other. The allotment to J. H. Morningstar was valued at \$6,300; this included the fourteen-acre tract valued at \$2,100. The allotment to Alice was valued at \$3,200. This would leave a balance upon allotment due her of \$1,550.

Alice assumed the "Walker" mortgage of \$1,128.65 and J. H. assumed the "Bachman" mortgage of \$1,539.75. The difference in the amount of the mortgages assumed was in favor of J. H., \$205.50, reducing the actual purchase money due Alice on the exchange to \$1,344.50.

In their settlement, however, the purchase money of the tracts was mingled with other items and there was found due Alice by settlement, after deducting the excess of the mortgage assumed by J. H., \$1,866.40. On the date of the partition deeds, a mortgage was given by J. H. to Alice Morningstar on the fourteen-acre tract for \$1,500, reciting it to be for purchase money. No very clear evidence is forthcoming as to the discrepancy between \$1,866.40 and \$1,500, the amount of the mortgage, but

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an inference arises that this amount was settled either by mutual accounts not shown or by cash payment.

The partition deed to Alice was signed by the wife of J. H. releasing dower, but she did not join in the mortgage. The \$1,500 mortgage is now asserted by Alice and claimed to be superior to the dower of Mrs. Morningstar, and to be in fact a purchase-money mortgage upon the entire interest in the fourteen-acre tract.

Counsel do not differ materially as to the principle governing a vendor's lien, but the difficulty arises in applying the principle to a case of amicable partition. As to the *property sold* the equity of the vendor attaches at the very instant of the conveyance and is therefore superior to the dower. And the controversy here arises out of the character and nature of the dower interest attaching it to the estate of the tenant in common, as affected by the partition.

There is a clear distinction between estates in joint tenancy as existing at the common law and estates in common. In the former the estate of all the joint tenants was regarded as one estate and no dower attached, but in case of tenancy in common each co-tenant had a separate freehold estate and inchoate dower in the latter case attached to the undivided interest immediately upon seizin of the husband. But such right of dower was subject to the right of partition by the co-tenants.

Tracing the legal title alone it would appear that J. H. Morningstar acquired one undivided half of this fourteen-acre tract by descent and one undivided half by purchase from Alice, the former having been acquired in 1886 and the latter in 1889.

It is claimed that a different principle applies in case of partition and that the difference in the value of the shares taken in severalty is a prior lien upon the larger purpart.

Partition may be either by judicial or voluntary proceedings. If by judicial proceedings the dowress is bound by the partition and her right attaches to the land apparted, or if the land can not be apparted, and is sold, the dower is divested and her right, if any, is transferred to the fund. *Weaver v. Gregg*, 6. O. S., 547; *Gillett v. Miller*, 12 C. C., 209.

In case of voluntary partition where equal shares are set off to the parceners the weight of authority is to the effect that the right of dower upon the co-tenant's share is remitted to the allotment in severalty. *Carter v. Day*, 59 O. S., 101; *First Scribner on Dower*, Sec. 341; *Doeterman v. Elder*, 27 Bull., 195.

It is claimed with much force and supported by a carefully and well prepared brief and argument that the same effect must be given to an amicable partition as to a judicial proceeding, and if dower is divested in the latter no less effect should be given to deeds of partition, especially as against the amount necessary to equalize the shares.

Dower is a statutory right. The statutes which give dower also divest it in certain contingencies. *Weaver v. Gregg*, *supra*.

No statute expressly divests dower on amicable partition, and hence such contention must find support in other authority.

It is argued that the difference in value between the larger and smaller purparts or divisions is a lien on the larger on the principle of owelty of partition, a doctrine originating in the chancery practice in England, and now recognized by statutes in many states. This doctrine is applied where it is impossible or impracticable to divide the estate in equal shares, and unequal allotments are therefore made subject to a charge upon the greater. Owelty of partition does not exist in this state as a statutory right. Where equal shares can not be allotted the entire estate is required to be sold and the proceeds distributed. But even if recognized in a case where the unequal division is made by consent, it yet remains to be considered what the effect of such a division has upon the inchoate dower of the wife of the tenant in common.

Owelty of partition where it exists is in the nature of a vendor's lien; but is it superior to dower?

The case of *Mosher v. Mosher*, 32 Maine, 412, supports the view that the inchoate dower attaching to the interest of the co-tenant acquired by descent is not affected by such lien. See, also, 11 Amer. & Eng. Enc. of Law, page 118; *Hordy v. Landrum*, 5 S. C., 213.

In *Thomas v. Bank of Maryland*, 32 Md., 58, the real estate descended to four children and by agreement was divided among

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three with a charge in favor of the fourth for her share. One of the three became involved and assigned without having paid the amount charged. It was held that the lien for such charge arising in the division of the estate rested only on the one-fourth interest acquired by purchase from the heir in whose favor the lien was claimed and not upon the three-fourth interest acquired in part by descent and in part by purchase from the other heirs.

Freeman in his work on Co-tenancy and Partition (Section 411), in reference to the rights of the wife of a co-tenant, says:

“By confining them to the equal shares which their husbands take in the partition they have all the dower the law gives them; a voluntary partition is allowed to operate upon inchoate rights of dower because these rights are not thereby destroyed or impaired, but affected in substantially the same manner that the estates of the husband are affected, and an undivided interest in the whole property becomes a several interest in a specified parcel.”

The author then takes up the case where a husband exercises the right of partition to defeat the wife's dower or defraud her, and says in such case the reason ceases, adding:

“Hence if he makes partition taking the smaller or less valuable property, receiving his compensation for so doing, the wife's right to have dower assigned at his death will not be restricted to the lesser purparty.”

In *Carter v. Day*, *supra*. Williams, J., discussing the principle upon which the authorities maintain that a partition of land creates no new title to the shares set off in severalty, confines the doctrine to cases where each co-tenant receives no more than his proper share of the land.

In *Freeman v. Allen*, 17 O. S., 527, where a tenant in partition took the whole estate by election, it was held that his estate was ancestral as to the interest acquired by descent, but as to the remainder acquired by election it was considered an estate by purchase.

It also argued that Mrs. Morningstar, the dower claimant, having joined in the partition deed to Alice, releasing her dower in her husband's interest in that tract, she consented to the partition and thereby became endowed with a larger amount of real

estate and ought not now to be permitted to assert dower as against the mortgage given for the excess of the share taken by her husband.

If authority is sought on this subject it can only be supported as an exchange of mutual interests which at common law puts the widow to an election between the tracts exchanged. 2d Blackstone's Commentaries, 323.

In order, however, to sustain a case of exchange the interests mutually transferred must be equal. Otherwise the right of dower will attach as in ordinary cases of sale and conveyance. 1st *Scribner on Dower*, page 288; *Wilcox v. Randall*, 7 Barber, 633.

Even if the doctrine of exchange applies, it would put the dowress to an election between dower in the interest conveyed by the husband and that received by the husband in the exchange, which is, in this case, the undivided interest of the husband acquired by purchase, and such doctrine would not affect the dower attaching to the interest of the husband which he had acquired by descent.

Upon a full and extended consideration the court has arrived at the conclusion that J. H. Morningstar, after the division of the estate, held title to the fourteen-acre tract, one-half by descent from his father and one-half by purchase from Alice. That the mortgage of Alice attached as a purchasing money mortgage as the first lien upon the interest acquired by purchase, but subject to the dower upon the undivided half acquired by descent.

The dower will be computed according to the usual tables and made the first lien on the undivided half so acquired by descent. As to the other undivided half the dower will be fixed at the same amount but made subject to the purchase money mortgage.

Robison & Yount and D. P. Irwin, for plaintiff.

Anderson, Bowman & Anderson, for defendant.

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BENEFITS FROM STREET IMPROVEMENT.

[Common Pleas Court of Franklin County.]

JOHN L. WALDSCHMIDT ET AL V. WILLIS G. BOWLAND,
TREASURER, ETC.*

Decided, December 4, 1904.

*Streets—Improvement of—Benefits—Validity of Assessment—Proof
Necessary to Secure Reduction of—Estoppel Against Grantees—
Does Not Arise, When.*

1. In an action for the reduction of a street assessment on the ground of lack of benefits, testimony and estimates as to the value of the abutting property before and after the improvement which leave the court in doubt will be resolved against the plaintiff.
2. Estoppel against contesting the validity of an assessment will not be inferred in the case of a grantee who purchased subsequent to the levying of the assessment, unless the language of the deed fairly warrants the conclusion that the grantee reserved from the purchase money an amount sufficient to satisfy the lien.
3. The expressions in the deed with reference to payment of an assessment will be construed in favor of the grantee where of an indefinite character, or where the agreement to pay an assessment is found in a separate clause and not as a part of the purchase price; nor does the language of the warranty that the premises are free and clear of all incumbrances except certain unpaid street assessments impose upon the grantee *per se* the obligation to pay such assessments.

DILLON, J.

In 1892, South Third street in this city was improved with a new brick street, for a distance of about 3,840 feet, between Fulton street and Rheinhard avenue. In the fall of the same year, the city council passed the ordinance assessing the costs of this improvement upon the abutting lots at the rate of \$8.01757 per front foot, the same to be paid in nineteen annual installments, with interest.

The plaintiffs in this case have paid twelve of those installments with one or two exceptions, and as lot owners upon said

*Affirmed by the circuit court, 6 C. C.—N. S., 99; circuit court affirmed by the Supreme Court, without report, 71 O. S., 484.

street, they ask that the remaining installments be declared null and void for the reason that they have already paid more than their respective lots were benefited by this improvement.

The main question, therefore, to be decided by this court is, whether or not the abutting lots and lands on this street were actually benefited in value by this improvement, in an amount at least equal to the assessment. The nature of this street is peculiar in this, that with the exception of a few store-rooms and saloons, the property was nearly all residence property and is occupied by a German settlement, and as to which there has been, up to the time of this improvement, very little change in ownership. Difficulty has, therefore, been experienced in obtaining the market values of the property. Previous to this improvement the street was a gravel street, very similar to a country road and was not a thoroughfare. The houses were small, being generally one or one and one-half stories in height, and being quite old.

So far as the testimony of witnesses who now attempt to give their recollection of values fourteen years ago, we are confronted with the same difficulty that has characterized so many of these actions in this court.

Of the witnesses for the plaintiffs, we have Mr. Heer, Mr. Bauman, Mr. Waldschmidt, Mr. Hirschman, Mr. Herman and Mr. Schumacher, all declaring that there is no increase in value, at all. These witnesses were evidently honest and their testimony must be weighed by the court in that light.

The testimony of Martin Kellner, to which I attach considerable weight, is to the effect that the lots were all benefited in the amount of two or three dollars per front foot, but complained, as did some of the other witnesses, that as a matter of market value, the property was not increased any by reason of the condition of the minds of the resident owners. They had not been accustomed or used to any such matters and were greatly frightened, and that the market value at that time was really a false one, and not a true one by reason of their fright, and the anxiety of some of them to sell their property even at a sacrifice.

I will not discuss the various phases of these witnesses, nor the fact that as to some of the witnesses I can not attach very

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much weight because of their failure to qualify. But continuing on the part of the defendant, we have the testimony of nine reputable real estate men to the effect that the property was increased in value from eight to ten dollars per front foot. One of the witnesses, Mr. Wirtwein, who has loaned money in that vicinity, alleging that the property was increased from ten to fifteen dollars per front foot and in one locality from fifteen to twenty dollars.

It would not be proper for juries, nor for a court sitting as a trier of fact, and therefore acting in the same capacity, to give the mental process by which facts are believed or doubted. I have examined the street myself, the character of the property, and after having heard all the evidence in the case, and the cross-examination has been adduced, I can not believe from my experience in the price of streets and the character of these lots and of this street, that the property was benefited to the full amount of the assessment. Nor can I accept the statements of those witnesses who find that the property was not benefited in any amount whatever.

The most reasonable conclusion to which I can come, when I take into consideration that the plaintiff must not leave the court in doubt, and that any figures involving doubt should be resolved against the plaintiff, is that the just and correct increase in value of these lots by reason of this improvement was \$6.50 per front foot and no more.

The next question which arises is the estoppel as to certain of the plaintiffs by reason of their having purchased their present property since the assessment, and by the terms of their deed having assumed and agreed to pay the assessment as a part of the consideration. To what extent the Supreme Court of this state will go in its final determination and settlement of the liability of a grantee of a deed, we have as yet no direct announcement except in their action in affirming the Caldwell case from our circuit court. In that case the grantee assumed and agreed to pay a street assessment as a part of the purchase-price of the lots and for the reason that by that act grantor in the deed had voluntarily waived any claim or right to the deduction thereof for himself, and by his act was in fact and in law paying the

claim himself, the grantee had no cause to complain at all, and was in the role of a mere interloper seeking to gain a benefit to which he was not in good conscience entitled. In other words, the theory is that the grantee reserves and takes out of the purchase-price a sufficient amount to meet the liens upon it.

We must, therefore, determine from the language of each deed whether the parties had placed themselves in that attitude or not. As the court is bound to construe strictly such liability, as the one imposed by the city in this case, estoppel of a grantee will not be inferred unless the language of the deed itself fairly warrants such facts to exist as would bring it under the rule of the Caldwell case.

The plaintiff, Peter G. Meinert, in his deed expressly assumes and agrees to pay the assessment as a part of the consideration. He, therefore, can not be relieved under the ruling of the Caldwell case.

The plaintiff, Frederick E. Schweinsberger, assumed and agreed to pay this assessment "in addition to the consideration hereinabove mentioned." This language, as I construe it, means that the parties had taken into consideration the amount of this assessment, that the grantee and the grantor each knew the amount, and that the grantee, as a part of the consideration, assumed the burden. He also, therefore, comes within the Caldwell case ruling. The same is true of the plaintiff, Fred J. Bauer, who uses the same language.

The plaintiffs, William F. Streng, Paulina Neubig and Eva M. Reeb, agreed to pay the assessment for the improvement of streets or alleys generally as well as taxes, in the following language, "Free and clear from all incumbrances whatsoever, excepting the taxes for the last one-half of the year 1892 and for the year 1903, and all assessments for the improvements of streets or alleys abutting on said premises, which taxes and assessments the grantee herein hereby assumes and agrees to pay when due."

This language is open to great doubt, but the grantees reserving to themselves to pay only when due, and the general terms of the assumption and the indefiniteness of the language used,

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compels me to grant these plaintiffs the relief prayed for, and as to them the rule in the Caldwell case will not be applied.

The plaintiff, Louis Reidelbach, agrees to pay the unpaid assessments for the improvement of Third street as a part of the consideration aforesaid, and, therefore, he falls within the Caldwell case, and no relief can be given him.

The plaintiff, Joseph Reidelbach, took his property free and clear from all incumbrances, except the regular taxes and assessments, and a certain mortgage which the grantee assumed and agreed to pay off and discharge. Nothing further is said in this deed which would bind Reidelbach, and the language is used simply to relieve the grantor from his liability on his warranty, and does not seem to be used for the purpose of defining the rights of the persons or with reference to the consideration. As to this plaintiff, therefore, the relief will be granted.

The plaintiff, John G. Kull, in purchasing his lot, agreed to pay, as a part of the consideration, the taxes for the year 1900, and also the last half of the taxes for 1899, and by a separate clause in the exception, he also agrees to pay any unpaid installment of street assessment.

I am in great doubt as to the proper construction of this language, but in view of the fact it is expressly recited that the taxes are assumed as part of the consideration, and that this agreement is separate from and this recital is omitted from the agreement to assume the street assessments, my conclusion is that the agreement will only bind him to pay such installments of street assessments as are constitutional and legal and not that portion which is void, and, therefore, the relief will be granted to this plaintiff.

The plaintiff, Mary A. Kaetzel, in purchasing her property, agrees to pay the assessment as a part of the "above consideration," therefore bringing her clearly under the Caldwell case.

The plaintiff, Martin L. Kellner, was given a warranty that the premises are free and clear of all incumbrances except the assessments for the improvement of South Third street, as far as the same are unpaid, which the grantee assumes and agrees

to pay. Here again the language used seems more to relieve the grantor of his liability on the warranty than to show an agreement of the grantee to pay as a part of the consideration, and whatever the presumption might be from the use of this language in view of an agreement between the parties to pay, as a part of the consideration or purchase-price, the presumption should be just as strong that they did not agree or assume to pay illegal or void assessments. And I will, therefore, grant the relief to this plaintiff. This applies to both of the tracts which were purchased by said Kellner.

The plaintiff, Frederick Klein, comes within the same list, as the same language was used in his deed. The same relief will be granted Louise Reidelbach.

The plaintiff, Sadie T. Dixon, took her property simply subject to any unpaid taxes and assessments and she is clearly relieved, in my opinion, and is entitled to the relief granted in this case.

For the reasons stated with reference to Kellner, George Stutz will be relieved, in spite of the language of his deed.

The plaintiff, J. L. Waldschmidt, agreed to pay the assessments, as a part of the consideration, and, therefore, comes within the rule in the Caldwell case, and he can not be granted the relief.

The plaintiff, Daniel Hellwig, agrees to pay the assessments, as a further consideration of said premises, and, under the rule of the Caldwell case, I can not grant him any relief.

A decree may be drawn, therefore, in accordance with the views expressed in this opinion. The relief being granted, of course, as to the original assessment.

Exceptions will be noted for all parties, and the appeal bond fixed at \$200.

Clark & Mosier, for plaintiffs.

Marshall & Weinlein, for defendant.

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In re Davis and In re Foote - Local Option.

EFFECT OF ANNEXATION OF "DRY" TERRITORY.

[Probate Court of Cuyahoga County.]

IN RE PETITION OF WILLIAM G. DAVIS; AND IN RE PETITION OF
C. H. FOOTE; CONTESTING THE LOCAL OPTION ELECTIONS HELD
IN THE CITY OF CLEVELAND, AUGUST 28, 1905.

Decided, August 18, 1906.

Liquor Laws—Status of "Dry" Territory not Affected by Annexation to a "Wet" Municipality—Brannock Law Election not Available in Beal Law Territory—Local Option in its Legal and Practical Aspects—Is Above Municipal Regulation, a Creature of the State and the Will of the Voters.

1. When an election has been held in a municipal corporation, under the provisions of the local option law known as the Beal Law, which resulted in favor of the prohibition of the liquor traffic therein, such prohibition continues in force, notwithstanding an annexation of the entire territory composing such municipality to another corporation in which no election has been held under the provisions of said law.
2. An election held under the residence district local option law known as the Brannock Law, within a part of the territory which formerly constituted said municipal corporation in which said Beal Law election was held, and within two years of the date of such Beal Law election, is invalid.

HADDEN, J.

The petitions in these cases disclose that elections were held in two districts of said city, on August 28, 1905, under the act of April 18, 1904 (97 O. L., 87, known as the Brannock law), to determine by ballot whether the sale of intoxicating liquors as a beverage should be prohibited within the limits of such districts, and resulted in both cases against the prohibition. The petitions allege that said elections were illegal for the reason that all of the territory included within the boundaries of said respective districts was formerly a part of the city of Glenville, then a municipal corporation in said county, and that on March 20, 1905, a local option election was held in said last named city, to determine by ballot whether the sale of intoxicating liquors as a beverage should be prohibited therein,

under the provisions of the act of April 3, 1902 (95 O. L., 87, known as the Beal law), and that election resulted in favor of prohibition; that on July 25, 1905, the entire city of Glenville, as constituted at the time of said Beal law election, was annexed to the said city of Cleveland, and since that time has been governed as a part of said last named city. In the petition filed by William G. Davis, the further objection is made that the district described in that case, known as the 46th district as numbered by the board of elections, contained exempt territory which could not be included under the Brannock law.

The sufficiency of the first ground of contest is raised by a demurrer filed in the Foote case by the mayor of the city of Cleveland, and in the Davis case by an answer filed by the mayor, which it is intended shall be taken as a demurrer for the purpose of this hearing, so far as the first ground of objection is concerned. It will perhaps help us towards a conclusion if we can ascertain the status of the territory which constituted the city of Glenville at the time of the Beal law election, immediately after it was annexed to the city of Cleveland. The search for authorities and decisions made by counsel for petitioners has been so thorough that it can safely be inferred from the fact that no Ohio adjudications are cited by them, that none exist. Outside of this state there are several adjudications which, although not harmonious, throw some light upon the question.

In Maryland there are two cases: *Higgins v. State*, 64 Md., 419, and *Jones v. State*, 67 Md., 256. In the former it is held that the subsequent detachment of territory from a district which has voted in favor of prohibition, does not have the effect of changing the status of the territory in which the election was held, divided or undivided. In other words, all the territory of the district in which an election was held, remains "dry," no matter how it may be subsequently divided.

In Alabama, *Prestwood v. State*, 88 Ala., 235, it was held that where in 1880, the sale was prohibited in a certain district and afterwards, to-wit, in 1886, the proper authorities created another district out of the territory which was included in the original district, the status of the latter district continued

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“dry,” and a sale therein after 1886 was illegal, because the effect of the prohibitive act was to establish prohibition as the law of the district within its boundaries as it was then constituted.

In North Carolina, *State v. Cooper*, 101 N. C., 684, it was held that where an election was held under the local option act, in a township, and afterwards the name of the township was changed by law, this does not have the effect of repealing the local option law therein.

In Texas, *Medford v. State*, 45 Texas Criminal Reports, 180, and *Woods v. State*, 75 Southwestern Reporter, 37 (both decided May 20, 1903), the court uses this language:

“It is too well settled now for discussion, where local option has been legally put in operation within a specified territory, it must remain in force in that territory until voted out by the qualified voters of that particular territory; that no power—legislative or judicial—has authority to change the boundaries of a local option territory, so as to render inoperative the law as put into operation during its pendency in that territory. The same authority that put it into operation must annul.”

And after conceding the power of the proper authorities to change the territorial limits or precincts, and create subdivisions for local option purposes, the court adds:

“But they have no authority in any event, to change the territory where the local option law is in effect, so as to annul the operation of that law or take any part of such territory from under its operation.”

While this language happens to be mere dictum in the case in which it was uttered, there can be no doubt that it is the settled law of Texas.

In Georgia, however, *Drummond v. Lowcry*, 88 Ga., 716, and *Hackney v. Leake*, 91 Ga., 141, a different rule seems to obtain with regard to a somewhat different subject-matter but the same in principle. It appears that two adjacent districts had voted on the subject of the stock law, or “fence” or “no fence,” and one of those districts decided in favor of “fence,” and the other in favor of “no fence.” Later, a part of the “fence”

district was detached therefrom and added to the "no fence" district. The court held that the part so detached and attached, at once became "no fence" territory.

The foregoing are all of the adjudged cases which have been found bearing upon the particular point now under discussion. The weight of authority, then, is to the effect that when once the status of a district is established under the local option act, that status continues to exist until the power that created it puts an end to it, and that power is the Legislature and the qualified electors of the territory. It can not be ended by the judiciary or by the power which divides or annexes political divisions. If this is the law, then the territory which made up the city of Glenville at the time of the annexation continued to be "dry" after the annexation, and is "dry" yet, unless these Brannock elections have had the effect to change the status of said residence districts.

It is the contention of the petitioners that the Brannock election held August 28, 1905, is invalid because of the provisions of Revised Statutes 4364-30i, namely: "But nothing contained in the provisions of this act shall affect, amend or repeal, or alter in any way, any other law or ordinance which prohibits throughout the municipality, the sale," etc., "of intoxicating liquor as a beverage," etc. This is a part of the Brannock law, and its purpose is manifest, namely, to make it impossible after a local option election under the Beal law has resulted in favor of prohibition, for a Brannock law election to be held in a part of the territory in which the Beal law election has been held. If Glenville, after having voted "dry" had remained a city, a Brannock law election could not have been held therein until another Beal law election had been held, resulting in favor of the sale, and the time not being ripe for another Beal law election in that territory, there has been no time since the date of said Beal law election when a Brannock law election would have been regular.

There are two arguments in support of the mayor's position. First, by the terms of the Beatty law, R. S. 4364-28, and the Beal law, R. S. 4364-20h, and the Brannock law, 4364-30i, and the Jones law, 98 O. L., 68, it is provided that the electors of

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every township, every municipal corporation and every residence district may hold another local option election "at any time after two years from the date of any election held under the provisions" of these acts. Therefore, it is clearly the legislative intent that the status of no territory shall be perpetually "wet" or "dry," unless the voters make it so, and that in all such political subdivisions, it shall be within the power of the electors to have a local option election in every part of such subdivision at the end of any such biennial period, if they want it. It is argued that if this territory remains "dry" after annexation, there can not be another Beal law election within it, because it is no longer the territory of a municipal corporation, but only a part of the territory of a municipal corporation. Nor is it possible to hold a local option election under the provisions of the Brannock law, because it is not all residence property.

But is not this difficulty or impossibility of holding a Beal law election in the territory formerly constituting the city of Glenville, a practical difficulty rather than a legal one? It is a legal possibility for a Beal law election to be held in the city of Cleveland, and if one should be held, every voter in every part of what was the city of Glenville up to the instant of annexation, would have an opportunity to vote on this issue, regardless of whether he lives in a residence or business district. Practically, it may be impossible to get the requisite percentage of persons to sign a petition for a Beal law election, but that is true now of many of the township and the smaller municipal corporations. The machinery created by law is the same in each place. If the voters are not disposed to use it, it is no fault of the law.

Second. It is a general rule when territory is annexed to a municipal corporation, that the annexed territory at once becomes subject to the ordinances and regulations of that corporation (*St. Louis Gas Light Co. v. St. Louis*, 46 Mo., 121). By analogy, it is urged that the territory which is annexed to a "wet" municipal corporation would partake of the status of the corporation to which it is annexed, even if the annexed territory had been voted "dry" before annexation, and *vice versa*.

But the status of "wet" or "dry" is not created by an ordinance or by a regulation. It is the creature of a state enactment plus the will of the voters. And the condition of a municipal corporation as to local option, after the electors thereof have taken advantage of all of the opportunities which the statutes of this state now offer them, would not always be easy to figure out. It is possible, both legally and practically, for Brannock law elections to be held in residence districts of a municipal corporation constituting more than seven-eighths of the territory thereof, and for all of those elections to result in favor of prohibition, although less than half of all the electors of the entire corporation have voted for prohibition. Would it be claimed that territory afterward annexed to such a municipal corporation would be what is commonly called "dry" territory? Certainly not; for the manifest reason that there is no regulation either by ordinance or by statute, which prohibits the sale of intoxicating liquors throughout the entire territory of that municipal corporation. So that we can have a case under the local option laws of this state, where practically all the territory of a municipal corporation may be "dry," and such result brought about by the votes of the minority of the electors of the corporation. This situation would plainly indicate that the rule laid down in the Missouri case above cited, does not extend to the matter of local option.

Entertaining these views, it becomes the duty of the court to overrule the demurrer to the petition in the Foote case, and so much of the mayor's answer as is treated as a demurrer in the Davis case.

Albert V. Taylor and T. K. Dissette, for the petitioners.

Newton D. Baker, City Solicitor, for Tom L. Johnson, Mayor.

C. M. White, for resident electors, defending the elections.

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PLEADING IN ACTION TO RECOVER ON ILLEGAL BRIDGE CONTRACT.

[Common Pleas Court of Franklin County.]

THE STATE OF OHIO, EX REL C. H. HUSTON, PROSECUTING ATTORNEY OF RICHLAND COUNTY, OHIO, v. HUSTON & CLEVELAND, A PARTNERSHIP.

THE STATE OF OHIO, EX REL PETER J. BLOSSER, PROSECUTING ATTORNEY OF ROSS COUNTY, OHIO, v. R. W. HUSTON AND W. N. CLEVELAND, PARTNERS.

THE STATE OF OHIO, EX REL CHARLES U. SHRYOCK, A TAXPAYER, ETC., v. HUSTON & CLEVELAND, A PARTNERSHIP.

THE STATE OF OHIO, EX REL M. S. WEBSTER, A TAXPAYER, ETC., v. HUSTON & CLEVELAND, A PARTNERSHIP.

BOARD OF COUNTY COMMISSIONERS OF LUCAS COUNTY, OHIO, v. HUSTON & CLEVELAND ET AL.

Decided, June 1, 1906.

Bridge Contracts—Pleading—Certificate under Burns Law—Averment that County Commissioners Confederated with Bridge Company—Failure to File Plans and Specifications—Sections 795, 796, 798 and 1277.

1. In an action brought by a prosecuting attorney, under Section 1277, to recover back money paid out on an illegal county bridge contract, a motion to strike out will not lie as to an averment that there was no certificate of the county auditor as required by the Burns law that the money required for payment for this bridge was in the bridge fund, or levied, or in process of collection.
2. Nor will such a motion lie as to the averment that the county commissioners combined and confederated with the defendant bridge company in making the contract and stipulating a price to be paid for the bridge which was grossly and unlawfully in excess of the true and reasonable value thereof as the county commissioners and the defendants well knew.
3. But an averment concerning the failure of the commissioners to comply with Section 795, relating to the substructure of bridges, will be stricken out where the action is for recovery of money paid for the superstructure only.
4. It was not the intention of the Legislature that bridges should be contracted for and constructed without any plans and specifications being prepared therefor; and an averment that a contract was entered into without proposals being solicited for a structure in ac-

cordance with any plans whatever, and that no plans were kept on file with the county auditor, is therefore good against a motion to strike out.

BIGGER, J.

The State, ex rel Huston, against Huston & Cleveland. This is an action brought by the prosecuting attorney of Richland county to recover back money, under the provisions of Section 1277 of Revised Statutes, alleged to have been illegally paid out.

The petitioner seeks to recover back certain sums of money alleged to have been paid out of the public funds to the defendant partnership for a certain bridge and bridge material. It is averred that this contract was illegal and void for several reasons stated in the petition. To this petition the defendants have filed a motion containing twelve separate branches. In so far as any of these several statements of alleged failures upon the part of the commissioners to comply with the law with reference to the letting of bridge contracts are clearly immaterial and irrelevant they may be and ought to be stricken out on motion, but in so far as they are not clearly so they will be allowed to stand to await determination of their sufficiency upon demurrer.

The first branch asks that the averments concerning the failure to comply with the Burns Law be stricken out. The only reason assigned by the defendants for this request is that it is not averred that the bridge fund was the fund from which the money was or should be drawn. But the statute provides for a bridge fund and I think the averment here that there was no certificate of the county auditor, as required by the Burns Law, that the money required for the payment of this bridge was in the bridge fund, or levied, or in process of collection, is sufficient and this is overruled.

The next averment asked to be stricken out is that the defendants and the county commissioners combined and confederated together in the making of the said contract and stipulated a price to be paid for the bridge and the bridge material largely, grossly and unlawfully in excess of the true value thereof, as the county commissioners and the defendants well knew, to the great damage of the county. A fraudulent contract is certainly an illegal contract and the plain purpose of the statute is to

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cover back into the treasury money paid out on fraudulent contracts, and if county commissioners and bridge builders enter into unlawful combinations to let bridges at exorbitant prices, it is the plain duty of the prosecuting attorney, when it comes to his attention, to at once proceed to recover the money back.

The third and fourth branches of the motion, which ask that the averments concerning the failure of the commissioners to comply with Section 795 of Revised Statutes be stricken out, is sustained, for the reason that this action is to recover back money paid out for the superstructure of a bridge, while the provisions of Section 795, relates only to the sub-structure for bridges (Section 796, relating to superstructures for bridges), and this action being brought to recover back money paid out for superstructure, Section 795 has no relevancy.

The fifth branch is overruled. Section 796 requires that the length and width of the superstructure be determined and whether it shall be single or double track. The sixth is also overruled.

The same section requires proposals to be made for bids. It does not appear that the sub-structure and the superstructure together may exceed an estimated cost of one thousand dollars, in which case it would be necessary to advertise under the requirements of Section 798. That objection must be raised by answer.

The averments which are asked to be stricken out in the seventh and eighth branches of the motion are that the commissioners wholly failed to invite or to consider any bids or proposals in accordance with the said plans, and that they failed to invite or to consider any bids or proposals upon any plans whatever, nor were any plans kept on file with the county auditor.

Counsel for plaintiff and defendant entertain opposite views with reference to the requirements of Section 796 as to the necessity of plans and specifications. I incline to the view taken by plaintiff's counsel that it was the intent and purpose of the Legislature to require plans and specifications in all cases, either to be prepared by the commissioners or caused to be prepared by them, or at the option of the bidders, to be prepared and submitted by the bidders themselves. It seems to me that the construction of the several sections of this chapter together show

this to be the proper construction, that is, that the county commissioners may cause plans to be prepared themselves, or they may allow the bidders to prepare and furnish their own plans, but that it was not the Legislature's intention to permit bridge structures to be contracted for and constructed without any plans and specifications of any kind. Taking that view, it seems to require that the court also overrule the objections raised by the other branches of the motion except that the eleventh paragraph or branch of the motion is sustained upon the authority of *Commissioners against Railroad Company*, 37th Ohio State, 205, and *Wilder against County Commissioners*, 41st Ohio State, 602, striking out these averments of the petition which I have indicated.

I am not clear that any other portion of it is irrelevant.

The State of Ohio, ex rel Blosser, the prosecuting attorney of Ross county, against Huston & Cleveland. In this case the the same motion, practically, is made as in the last, and the rulings are the same.

There is also an additional averment, however, in this petition, to the effect that the defendant belonged to a trust or combination, the purpose of which was to increase, control and regulate the prices at which such bridges should be sold, and that, in pursuance to this combination, and in carrying it out, this contract was made. This, I think, raises an immaterial issue and should be stricken out. The validity of this contract must depend upon its terms and conditions, and not upon the validity or invalidity of some other contract which these defendants may have had with other persons. If they were members of such a combination they may be punished as provided by law, but the fact that they might belong to such a combination would not render the contract void if made in accordance with the statutes of the state, and for a fair and reasonable price, and free from fraudulent combination between the commissioners and the defendants. For fraudulent combination between the commissioners and the defendants, the contract may be declared void, but not because of some other contract which might be illegal. The real issue should not be confused and obscured by the raising of immaterial issues, and this averment is also stricken out.

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The State of Ohio, ex rel Blosser, the prosecuting attorney of Muskingum county, against Huston & Cleveland. The same questions are raised in this case as in State, ex rel Huston, against Huston & Cleveland, and the rulings are the same.

The same is true of the case of The State, ex rel Webster, against Huston & Cleveland.

The Board of County Commissioners of Lucas County against Huston & Cleveland. In this case the motion is overruled. There is a portion of it which is irrelevant, and if it had been asked to be stricken out without joining with it other matter which I think is, or may be, immaterial, it would have been ordered stricken out, but the defendants asked to have matter stricken out with it which I am not clear is immaterial. For this reason, the motion is overruled.

Laser, Huston & Marquis, for plaintiffs.

B. G. Watson, for defendants.

PROPERTY INTERESTS IN DIVORCE ACTIONS.

[Common Pleas Court of Summit County.]

LYDIA G. HAMILTON V. MINNIE RUDY.

Decided, October 5, 1906.

Divorce and Alimony—Action for Lis Pendens, When—Conveyance of Property by the Husband before Service of Summons but with Knowledge of the Filing of the Suit—Title—Fraud—Constructive Notice—Grantee in a Fraudulent Conveyance will be Protected to the Extent of Money Actually Paid, When.

Where a wife brought suit for divorce and alimony against her husband, describing a house and lot, occupied by her and owned in common by her and her husband, and asking that the same be set off to her as alimony, and caused proper process to issue in said suit, which was returned "not found," and the husband within a short time after the issuing of said process and just before second process was issued, but having knowledge that his wife had brought suit against him for divorce, conveyed his interest in said property to a woman with whom he was boarding, for an inadequate consideration, under circumstances which warrant the court in finding said conveyance to be fraudulent, and very soon after said transfer, proper service was made upon the husband, and the wife was granted a divorce and granted said property as alimony—*Held*: That said case was "pending" so that upon decree setting aside

said transfer, the decree in the divorce suit transferring the property to the wife, operated to convey title to the wife as against the husband and his grantee and a subsequent purchaser who acquired title with constructive notice and without value.

WASHBURN, J.

There are certain facts in this case that are not disputed, which are as follows:

For a long time previous to September, 1901, Andrew Rudy and Minnie Rudy were husband and wife, and resided with their children on premises in Barberton, Summit county, Ohio, which they owned in common, each owning one-half thereof. Andrew Rudy owned no other property.

In September, 1901, Andrew Rudy deserted his wife and family and went to Dayton, Montgomery county, Ohio, and began boarding with Adalena Miller, whom he afterwards married.

On September 18, 1902, Minnie Rudy sued Andrew Rudy for divorce and alimony in Summit county, and although two attempts to get service upon Andrew Rudy by issuing process to the Sheriff of Montgomery County were made, no service was obtained until March of 1904.

In the meantime Andrew Rudy had brought suit for divorce in Montgomery county, and later dismissed his suit.

On February 1, 1904, Minnie Rudy filed an amended petition for divorce in which she described her husband's half interest in said premises, and asked that the same be given to her as alimony. Summons on the amended petition was issued to the Sheriff of Montgomery County on February 1, 1904, and returned "not found."

On February 24, 1904, Andrew Rudy deeded his said one-half interest in said premises to Adalena Miller, the consideration therefor, as testified to by Andrew Rudy and Adalena Miller, being \$200 cash and an account of about \$100 which Adalena Miller held against Andrew Rudy, and said deed was recorded in Summit county on February 26, 1904. The whole property was worth \$2,500 at the time of said sale of a half interest of it.

On February 29, 1904, another summons was issued on the amended petition, and the same was regularly and properly served on Andrew Rudy on March 2, 1904.

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On May 21, 1904, Minnie Rudy was granted a divorce from Andrew Rudy and was also granted his one-half of said premises as alimony, and he was ordered to convey same to her within five days, and on his failure to so convey it was ordered that said decree should operate as a conveyance. Then said decree contained the following provision:

“It is further ordered, adjudged and decreed that in the event said defendant has conveyed his interest in said real estate above described, so as to defeat the order, decree or judgment, awarding the interest of said defendant in said premises to the plaintiff as her alimony, the plaintiff is hereby allowed and decreed as reasonable alimony the sum of \$1,000, which is to be paid in monthly installments of \$25 on the first Saturday of each and every month until said sum is paid, or until the further order of the court.”

During all this time and up to the present time Minnie Rudy with her children has occupied the whole of said premises and has improved the same and exercised ownership over the same.

On September 10, 1904, Andrew Rudy married Adalena Miller. On September 2, 1905, Andrew Rudy and Adalena Miller Rudy conveyed said half of said premises to the plaintiff in this suit, Lydia G. Hamilton.

As I have said, the foregoing facts are not disputed.

October 19, 1905, this suit was begun by plaintiff to partition said premises. The defendant, Minnie Rudy, answered, claiming said premises under her decree, charging that these transfers were made with full knowledge and without consideration, for the purpose of cheating and defrauding her, and asking that the deeds be declared void and her title quieted. Plaintiff replied, denying charges of fraud.

As to the disputed facts, I find that at the time of the conveyance by Andrew Rudy to Adalena Miller they both knew that Minnie Rudy had brought suit for divorce against Andrew Rudy in Summit county, although no summons had then been actually served on Andrew Rudy; and further that Adalena Miller knew that Andrew Rudy had no other property, and that his wife was in the possession and actual occupancy of said premises.

At the time of the conveyance by Andrew Rudy and Adalena Miller Rudy to plaintiff, said decree of divorce giving said prop-

erty to the defendant, Minnie Rudy, was a matter of public record in Summit county, where the land was situated, and I find that plaintiff was informed that said Andrew Rudy had been divorced from defendant; that defendant was living in and occupying said premises, and that said Andrew Rudy and his then wife did not know what interest they had in said property; that plaintiff made no investigation as to said property, but traded property therefor which was of no value, and which said Andrew Rudy and Adalena Rudy had not seen and knew nothing about.

Being convinced that the evidence establishes all of the foregoing facts, what decree should a court of equity make?

While technically speaking the wife's right upon divorce being granted to have alimony out of the husband's estate may not make her a creditor, still in one sense she is a creditor. In 31 O. S., page 1, Judge Boynton in delivering the opinion of the court, said:

"The claim for alimony rests on the common law obligation of the husband to support the wife in a manner suitable to his condition and station in life during the existence of the marriage relation. And this obligation is as binding after the commission by the husband of a marital offense entitling the wife to a divorce, as before. In respect to such obligation she may well be held to be a creditor of the husband."

This language is quoted with approval in 50 O. S., at page 481. Indeed there are a number of cases in Ohio in which the wife's claim to alimony is especially favored in a court of equity. 12 C. D., 526; 10 C. D., 321; 63 O. S., 220; Wright, page 492.

From the evidence in this case it appears to the court that Andrew Rudy and Adalena Miller knew that the defendant had sued Andrew Rudy for divorce, and knew he had no other property, and knowing that the chances were very favorable for the defendant securing Andrew Rudy's half of this property as alimony in said suit, for the purpose of defeating the defendant in her effort to obtain said property as alimony, executed and delivered the deed in question from Andrew Rudy to Adalena Miller, and all things being considered the circumstances warrant the court in saying that that was a fraudulent conveyance, and as against the defendant is void.

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There can be no doubt that Andrew Rudy intended to prevent defendant's securing alimony, and considering the price paid by Adalena Miller and her knowledge that defendant was the wife of Andrew Rudy and was in the possession of said property, and had sued him for divorce, Adalena Miller can not be considered an innocent purchaser; indeed, under the circumstances, it is reasonable to conclude that she sympathized with Andrew Rudy, and was willing to assist him in his efforts to prevent defendant securing said property as alimony.

But it is said by counsel for plaintiff that the defendant can not prevail, because the divorce suit was not *lis pendens* at the time Andrew Rudy conveyed to Adalena Miller, and the case not being *lis pendens*, no valid decree could have been made transferring the property to the defendant without making Adalena Miller a party to the suit, which was not done.

It is true that under our statute, Section 5052, which is declaratory of the common law, an action is not "pending so as to charge third persons with notice of its pendency" until "summons has been served or publication made," that is, the mere filing of the petition and service of summons will "charge" innocent third parties with notice, although they have no actual notice, still, where the third parties have actual notice of the filing of the petition, and instead of being innocent third parties, are attempting to perpetrate a fraud upon the party filing the petition, then that suit as to them is "pending," so as to prevent said third parties from retaining the fruits of their fraud as against the party filing the petition.

While this is not technical *lis pendens* because the court at the time of the transfer had not acquired jurisdiction over the person of the defendant or of the subject-matter of the suit, yet, when a transfer of the property made after the petition was filed has been set aside by a court of equity because of fraud, the divorce case should be held to have been so "pending" as to render the decree of the court in the divorce case transferring the property, operative as against the defendant who is later regularly served and those who participated with him in the fraud, and their grantees who acquire title with at least constructive notice and not for value.

The plaintiff in this case who purchased the property after the marriage of Andrew Rudy and Adalena Miller is in no

better position than Adalena Miller; indeed, it seems that she is in a worse position in a court of equity; because at the time she purchased and for a year previous to that time there was a judgment of the court of common pleas in the county where this land was situated, conveying this property to the defendant as alimony, and the defendant was still in the possession of all of the property and was exercising ownership over the same, and in addition thereto Andrew Rudy and his then wife at the time they sold to the plaintiff, told the plaintiff that they did not know what interest they owned in the property; that there had been a suit for divorce and the extent of their interest was unknown to them. and besides, the plaintiff in fact paid no consideration for said premises.

The facts as known by the plaintiff when she purchased, together with the records of Summit county of which she had constructive notice, were suggestive of the fraudulent character of the transfer to Adalena Miller, and rendered competent the testimony showing that plaintiff really paid nothing for the property.

Without further discussing the matter it seems to me that the equity of this case is upon the side of the defendant, and a decree may be taken dismissing the plaintiff's petition, and granting the prayer of the defendant's cross-petition, setting aside the conveyance from Andrew Rudy to Adalena Miller and from Andrew Rudy and Adalena Miller Rudy to the plaintiff, and quieting the title of the defendant to the whole of said premises.

There are cases where conveyances are set aside on the ground of fraud in which the grantee is protected to the extent of the money actually paid; but this is not a case which calls upon the court to protect the plaintiff to the extent of Adalena Miller's actual payment to Andrew Rudy, for the reason that the plaintiff did not pay that money, and the plaintiff took the property with full knowledge, in law, and paid nothing therefor, and it would not be equitable to require the defendant to pay the plaintiff the money Adalena Miller paid to Andrew Rudy.

Notice of appeal may be entered for the plaintiff and bond therefor fixed at \$150.

Tibbals & Frank, for plaintiff.

Kohler & Mottinger, for defendant.

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COUNTY COMMISSIONERS AND TOWNSHIP SCHOOLS.

[Common Pleas Court of Champaign County.]

THE BOARD OF EDUCATION OF WAYNE TOWNSHIP, CHAMPAIGN
COUNTY, OHIO, v. J. MONROE SHAUL AND MABEL
KAUFFMAN.

Decided, October 8, 1906.

*Schools—Authority of Township Boards of Education—When the
County Commissioners may Intervene—Judicial and Ministerial
Duties of Township Boards—Centralized Schools—Pleading—In-
junction—Sections 3921, 3922, 3969 and 4007.*

1. A petition by a township board of education states a cause of action when it alleges that the defendants have unlawfully taken possession of the school houses in certain sub-districts, and have unlawfully assumed authority to teach school therein, and have interfered with the plaintiff in its control of the schools in said sub-districts.
2. Where a township board of education voluntarily or willfully fails to perform any of its ministerial duties, the county commissioners may step in and perform such duties as authoritatively and in the same manner as though it was a board of education which was acting.
3. But with reference to the judicial duties of a township board, such as the suspending at its discretion of the schools in certain sub-districts, or the abolishing of the sub-districts and the providing in either instance for the conveyance of the pupils to other public schools or to one or more centralized schools, the county commissioners are without authority to interfere or to reverse orders made by the township board in that behalf; and the fact that the action of the township board was contrary to the will of the people and against their protest does not change the rights of the board in that regard.
4. Where county commissioners have wrongfully interfered in such a matter, and the illegality of their action does not appear on the face of the record of their proceedings, but is shown by evidence contrary to what appears on the record, injunction is the proper remedy for the township board.

MIDDLETON, J.

These two cases are substantially the same, and are submitted to the court upon the petitions of the plaintiff, and a motion on

behalf of the defendant to dissolve a temporary restraining order heretofore granted by the court, restraining the defendants from teaching the sub-district school in sub-districts, numbers 2 and 12, respectively, of said township. With the exception of the name of the defendant and numbers of the sub-district, the petitions are the same.

In the case against J. Monroe Shaul, the petition avers that on or about the 18th day of September, 1906, the defendant without any authority, legal or otherwise, and without the knowledge or consent, and against the will of the plaintiff, unlawfully and forcibly entered and took possession and assumed the control of the school house in sub-district No. 12, in said township of Wayne, and has unlawfully assumed authority to teach school in said sub-district; and has without any authority whatever, interfered with the plaintiff in its control and supervision of said sub-district and of the pupils therein; and has ever since the date aforesaid, unlawfully and forcibly prevented, and does still unlawfully and forcibly prevent the plaintiff from having the possession, use and control of said school house, and has ever since said date, unlawfully and without warrant of law and without any authority whatever, interfered with the plaintiff in the supervision, management and control of the school provided for the said sub-district by this plaintiff, and for which said sub-district this plaintiff is legally required to have and maintain a school, as the law directs. And the defendant has ever since said date unlawfully interfered with the plaintiff in the management and supervision of the pupils residing in said sub-district, for whom this plaintiff is legally required to have and maintain a school; and threatens to and will continue the aforesaid unlawful prevention of the use and control by the plaintiff of said school house, and the having, holding, and maintaining of the school by said plaintiff for said sub-district throughout the entire school year; and threatens to and will continue the aforesaid unlawful interference with the plaintiff in the supervision, management and control of the school provided for said sub-district by this plaintiff; and threatens to and will continue the aforesaid unlawful interference with the

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plaintiff in the management and supervision of the pupils residing in said sub-district unless restrained therefrom as herein-after prayed for. By reason whereof, a great and irreparable injury has been done, is being done, and will continue to be done the plaintiff and the patrons of said school provided for said sub-district.

The defendant interposes the following motion:

Now comes the defendant and moves the court to dissolve and vacate the temporary order of injunction allowed, and made herein for the following reasons, to-wit:

First. The petition does not state facts sufficient to constitute a cause of action in favor of plaintiff and against the defendant.

Second. The board of education of Wayne township did not authorize the bringing of this action.

Third. Because the allegations made in the petition are not true.

The third ground of the motion to dissolve is submitted to the court upon testimony; the evidence of the defendant in support of this ground of the motion being the record of the proceedings of the board of county commissioners of Champaign county of September 17, 1906, showing the employment of the defendants by the board to teach the schools in said sub-districts Nos. 2 and 12; and the evidence offered in support of the petition by the plaintiff being the record of the proceedings of the board of education of Wayne township, Champaign county, Ohio, of August 10, 1906, showing a suspension of these two sub-districts, Nos. 2 and 12, for one year by said board, the changing of the boundary lines of said district No. 2 by said board; and the record of the proceedings of the board of education of August 31, 1906, showing an acceptance of a contract and bond of C. W. Autram, as driver in district No. 12, and the appointment of a committee of two for conveyance in district No. 2; the record of the proceedings of the board of education of Wayne township, of September 14, 1906, showing the approval of a contract and bond of W. S. Chatfield for conveying pupils in district No. 2 to Cable and other sub-districts; and the appointment of a com-

mittee of one to arrange for the conveyance of pupils in district No. 2, not already arranged for; and the adoption of a motion by the board to retain E. L. Bodey and C. E. Buroker, attorneys, to represent the board in the legal matters then pending, or which might thereafter be brought in the matters of re-districting, centralization and suspending the schools of the township.

The record of the proceedings of the county commissioners of September 17, 1906, offered by the defendants in support of the third ground of their motion to dissolve the temporary restraining order, is as follows:

“COMMISSIONERS JOURNAL No. 16, page 558. *In Matter of the Wayne Township Schools.*

“In pursuance of an adjournment from September 4th, 1906, the above matter came up. The county commissioners being fully advised by evidence in the hearing before said board, are satisfied and do find that the board of education of Wayne township has failed to provide sufficient school privileges for all the youth of school age in sub-districts Nos. 2 and 12 of said township, and that said board has failed to provide for each school an equitable share of school advantages as required by law, and have failed to hire school teachers for said sub-districts Nos. 2 and 12. To the foregoing decision and finding, the said board of education of Wayne township excepts.

“Mr. D. R. Kimball moved to employ J. M. Shaul as teacher for said sub-district No. 12 at a salary of \$43 per month as teacher, and \$2 per month for janitor services, for the period of eight months or so long as he continues as teacher of said school. Motion carried on roll call by the following vote: Couchman, aye; Kimball, aye; Hodge, aye.

“Mr. Kimball moved to employ Mabel Kauffman teacher of sub-district No. 2, Wayne township, at a salary of \$43 and \$2 janitor fees per month, for a period of eight months, or as long as she shall continue as teacher of said school. Motion carried by the following vote: Mr. Couchman, aye; Kimball, aye; Hodge, aye.”

The record of the proceedings of the board of education of Wayne township of August 10th, 1906, relating to the suspension of the schools in districts Nos. 2 and 12, is as follows:

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“Motion by Breedlove, seconded by Johnson, that board suspend districts Nos. 2 and 12 for one year, and convey to Cable. McClellan, yes; Johnson, yes; Breedlove, yes; Madden, no; Hardman, not present. Motion carried.”

The record of the board of education of this date, referring to the changing of the boundary line of district No. 2 is as follows:

“Motion by Breedlove, seconded by Johnson, that we change the boundary line of district No. 2 as follows: * * * Motion carried.”

The record of the proceedings of the board of education of August 31, 1906, relating to the acceptance of a contract of C. W. Outram for driver in district No. 12, is as follows:

“Moved by Johnson, seconded by Breedlove, that board accept contract as read, and hire C. W. Outram driver as per contract. McClellan, yes; Breedlove, yes; Madden, no; Hardman not present. Motion carried.”

That relating to the acceptance of his bond is as follows:

“Motion by Johnson, seconded by Breedlove, that board accept C. W. Outram's bond as read. McClellan, yes; Johnson, yes; Breedlove, yes; Madden, no. Motion carried.”

That relating to the committee of two to arrange for the conveyance of district No. 2 is as follows:

“Motion by Johnson, seconded by Breedlove, that committee of two be appointed to arrange for the conveyance of district No. 2. McClellan, yes; Johnson, yes; Breedlove, yes; Madden, no. Motion carried. Johnson and Breedlove appointed as a committee.”

The record of the proceedings of the board of education of September 14, 1906, relating to the contract and bond of W. S. Chatfield for conveying pupils in district No. 2 to Cable is as follows:

“Motion by Breedlove, seconded by Johnson, that board approve and accept contract and bond of W. S. Chatfield for con-

veying pupils in district No. 2 to Cable. McClellan, yes; Johnson, yes; Breedlove, yes; Madden, no. Motion carried."

And that relating to the committee to make arrangements for conveyance of pupils in district No. 2, not already arranged for, is as follows:

"Motion by Johnson, seconded by Breedlove, that committee of one be appointed to make arrangements for the conveyance of pupils in district No. 2, not already arranged for. McClellan, yes; Johnson, yes; Breedlove, yes; Madden, no; Hardman not present. Motion carried."

It appears from these records that on August 10, the board suspended the schools in sub-districts Nos. 2 and 12, and that on August 31, the board accepted a contract and bond of C. W. Outram for driver in district No. 2, and on September 14, that the board accepted a bond and contract of W. S. Chatfield for conveying pupils in district No. 2; and also that the board attempted, at least, to change the boundary lines of district No. 2 at its meeting of August 10; and while it is not so stated specifically in the minutes of the proceedings of the board, I think it is apparent upon the face of the record that the contract of September 14, with W. S. Chatfield for conveying pupils in district No. 2, covered the territory of said sub-district, as it stood or remained after the changing of the boundary lines of said sub-district by the board of August 10, 1906; and that by further action of the board September 14, 1906, it was intended to provide for conveyance of the pupils residing within the original boundary line of district No. 2, and not included in the territory of the district as it stood after the change in the boundary line.

While referring to this subject of the change in the boundary line of sub-district No. 2, or at least the attempt to change such line, by the board of education, I may say that while the record of the proceedings of the board of education does not affirmatively show that the committee, appointed by the board to arrange for the conveyance of the pupils formerly included in sub-district No. 2, actually made such arrangement before the date

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of the employment of the teachers by the board of county commissioners, there is no evidence before the court to show that said committee had not made such arrangement, and in the absence of such proof, the court is of the opinion, if any presumption arises in the matter at all, the presumption is that the committee had discharged its duty in this respect and made arrangement for the transportation of such pupils to another sub-district school. Besides, as will more clearly appear from the opinion of the court hereinafter expressed, the failure on the part of the board of education to arrange for the transportation of these pupils would not of itself warrant the commissioners in reversing the order of the township board of education, and re-instating district Nos. 2 and 12, and employing teachers for the schools thereof; nor, in this view of the matter, can it make any difference whether the meeting of the board, at which this change was attempted, was or was not a regular meeting of such board.

With respect to this third branch of the motion to dissolve the injunction, the first questions that arise are: Had the commissioners on the 17th day of September, 1906, authority to employ a teacher for sub-districts Nos. 2 and 12? Was their employment by the said commissioners lawful? Have said teachers the lawful right to occupy the school house in said sub-districts and teach the school therein? Or, is their occupancy of such school houses and their attempt to teach the schools in said sub-districts unlawful and without authority? Does the act of the defendants in this respect, interfere with the plaintiff, the board of education of said township, in its lawful control and supervision of said sub-districts and of the pupils therein, and of the school provided for said sub-districts, and with the management by the plaintiff, the board of education, in the management and supervision of the pupils residing in said sub-districts?

The determination of these questions involves the correct construction of several sections of the statutes of Ohio, defining the authority and prescribing the duties of a township board of education and the county commissioners, with respect to the maintenance of the public schools in a township school district.

These sections are parts of Title 3 of the Revised Statutes of Ohio. The sections more directly involved, are Sections 3921, 3922, 3969 and 4007.

Section 3921 provides as follows:

"The division of township school districts into sub-districts as they exist at the time of the passage of this act, shall continue and be recognized for the purpose of school attendance, but the board of education is authorized to increase or diminish the number or change the boundaries of the sub-districts at any regular meeting, a map designating such changes to be entered upon its records."

Section 3922, or that part that bears upon the case at bar, provides as follows:

"The board of education is authorized to suspend the schools in any or all sub-districts in the township district, but upon such suspension the board must provide for the conveyance of the pupils residing in such sub-district or sub-districts to a public school in said township district, or to a public school in another district, the cost of such conveyance to be paid out of the funds of the township school district; or the board may abolish all the sub-districts providing conveyance is furnished to one or more public central schools, the expense of such conveyance to be paid out of the funds of the district."

And that part of Section 4007 bearing upon the case at bar, is as follows:

"Each township board of education shall establish and maintain at least one elementary school in each sub-district under its control, unless transportation is furnished to the pupils thereof, as provided by law."

These several sections of the statute clearly authorize the board of education to suspend the schools in its discretion in any and all of the sub-districts in the township district, and to provide for conveyance of the pupils in such district or sub-districts to other public schools; or to abolish all the sub-districts and provide conveyance to one or more central schools.

Section 3969, and the one under which the defendants in these cases claim the right to perform the services provided for by the action of the board of county commissioners, is as follows:

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“If the board of education in any district fail in any year to estimate and certify the levy of a contingent fund as required by this chapter, or if the amount so certified is deemed insufficient for school purposes, or if it fail to provide sufficient school privileges for all the youth of school age in the district, or to provide for the continuance of any school in the district for at least seven months in the year, or to provide for each school an equitable share of school advantages as required by this title, or to provide suitable school houses for all the schools under its control, or to elect a superintendent or teachers, the commissioners of the county to which such district belongs, upon being advised and satisfied thereof, shall do and perform any or all of said duties and acts, in as full a manner as the board of education is by this title authorized to do and perform the same; and the members of a board who cause such failure shall be each severally liable, in a penalty not to exceed fifty nor less than twenty-five dollars, to be recovered in a civil action in the name of the state upon complaint of any elector of the district, which sum shall be collected by the prosecuting attorney of the county, and when collected shall be paid into the treasury of the county, for the benefit of the school or schools of the district.”

Had, then, the county commissioners of Champaign county, authority to employ the defendants as teachers in these two sub-districts in view of these statutes? Had the township board failed to provide sufficient school privileges for all the youth of school age in their district, or to provide for each school an equitable share of school advantages, as required by the statute? Or to bring it a little nearer the controversy in these cases, had the township board failed in either of these respects in regard to sub-districts Nos. 2 and 12?

The duties imposed upon township boards of education are like those imposed upon many other public officers—either ministerial or judicial.

In *Place v. Taylor*, 22 Ohio State, 322, the Supreme Court defines the judicial duties of a public officer to be those, the manner of discharging which is left to his own judgment and concerning which he may use his own discretion, and his ministerial duties to be those concerning which he has no discretion, but which he is required to perform in a particular way. In

other words, the manner of discharging his judicial duties is left to his own judgment and discretion, but he has no discretion in the discharge of a ministerial duty. With respect to such duties he must proceed in a specified manner. To illustrate in this case: fixing the tax rate, certifying same to county auditor, establishing a sufficient number of elementary schools in the township, providing school houses for the convenience of the pupils, employing teachers, furnishing school appliances, fuel, etc., making arrangement for transporting pupils from a sub-district suspended to another school, and the like, are ministerial acts; but changing the boundary lines of a sub-district, abolishing sub-districts and suspending the schools therein, are judicial acts of the board. The former duties, the statute requires of it and specifies the manner in which it shall perform such duties; the latter it may do or it may not do, as in its judgment and discretion it may deem best.

That such judicial discretion of a public officer can not be controlled by the courts, is well settled by abundant authority in Ohio, nor under the construction this court places upon the provisions of Section 3969, above quoted, can this discretion be controlled by the county commissioners. The evidence in this case clearly shows that the board of education had suspended the schools in these two districts, and the action of the county commissioners in hiring teachers in these sub-districts, in effect reversed the action of the school board and re-instated the same. If the board of education, having suspended the schools in these sub-districts, had failed to furnish transportation to other schools as provided by law; that is, had failed to perform its ministerial duty, imposed upon it in this respect by the statute, then the commissioners would have had authority to provide for such transportation, but the board of education, having by its order suspended these schools and having, as the court thinks the testimony shows, made provision for the transportation of these pupils to other districts, the commissioners were not vested by the statute with authority to review and change, or in any manner interfere with the order of the board of education in this respect.

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A board of education of a township, under the statute, as it now stands, is not required to provide for one primary school in every sub-district. Prior to the amendment of Section 4007, April 25, 1904, the board *was* required to do so. The language of the statute then being "Each township board of education shall establish and maintain at least one elementary school in each sub-district under its control." The amendment above referred to provides that "Each township board of education shall establish and maintain at least one elementary school in each sub-district under its control *unless* transportation is furnished to the pupils thereof as provided by law."

Section 3922 of the act that enacted the foregoing and above amendment provides:

"The board of education of any township school district is authorized to suspend the schools in any or all sub-districts in township districts, but upon such suspension the board must provide for the conveyance of pupils residing in such sub-district to a public school in said township district," etc.

It is clear from these acts that the board of education of Wayne township had the right to suspend these schools and provide for transportation of the pupils to another public school in the township, and the evidence before the commissioners shows that this is what the board of education of Wayne township had done.

The question whether the board, in suspending these schools, acted wisely or in accordance with the will of the patrons of the schools suspended is not before the court, and the court is not called upon to deal with this question. The board may have acted arbitrarily; it may have used bad judgment in suspending these schools, and it may have acted against the will of the people of these districts, and the court is inclined to the belief that the board did act at least contrary to the will of these people and against their protest, and that its action in this respect is open to just criticism, but this does not change the rights of the board under the statutes.

If public officials, elected by the people, in the discharge of their duties as such, fail to do the will of the people, it is the

right of the people, under our elective system of government, if they choose to do so, to elect as their successors those who will.

The court's construction of Section 3969 is, that when a board of education fails in any year to do any of the things enumerated therein, all of which in the opinion of the court come within the class of ministerial duties, as hereinbefore defined, the board of county commissioners, upon being advised and satisfied thereof, may do and perform any and all of said duties in as full a manner as the board is authorized to do. But, even as to these acts enumerated, the court thinks that a mere difference of opinion between the commissioners and the board of education as to the manner of doing them, does not give the former the right to act for and instead of the board. The penal clause of this statute provides that the members of the board who caused *such* failure shall be each severally liable in a penalty not to exceed fifty dollars nor less than twenty-five dollars. I think this throws some light on the true construction of the statute, and the intention of the Legislature in enacting it. The same failure, it seems, that would give the commissioners authority to act, would subject the members of the board to the penalty. The penal provision of the statute must be construed strictly, and it can hardly be said that the Legislature meant any other than the willful, voluntary failure on the part of the members of the board to do any of the things enumerated in the act. The statute was not intended to punish a member of the board of education for a mistaken, or lack of, judgment in the performance of any of his duties however unsatisfactory the result might be to the pupils or people of the township. The language of the statute is "The members of the board who cause *such* failure shall suffer the penalty"; that is, the failure that shall authorize the commissioners to act in the matter, but whether the court is right or not in this view of the penal provision of the statute, it is clear that before the commissioners can act in place of the board of education, the board must have failed to act in some of the particulars mentioned in the statute. The evidence before the commissioners and the evidence in sup-

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port of the motion before the court, in its opinion, does not show any such failure. The only failure was the failure of the board to employ teachers in these sub-districts, Nos. 2 and 12, and this was in fact no failure in view of the action of the board formerly taken to suspend the schools in these sub-districts. It has been suggested by counsel for the defendants that the board had not provided for the transportation of that portion of the pupils of district No. 2, cut off by the changing of the boundary line of that sub-district. So far as this is concerned, the evidence shows that a committee was appointed by the board on September 14, three days before the beginning of the schools, to provide for the transportation of these pupils, and there is no evidence to show that the committee had failed to discharge this duty. Besides, if it had so failed, the commissioners, in the opinion of the court, would then have authority only to provide for such transportation and would not, by reason of such failure, be authorized to re-instate the sub-districts or hire a teacher for the same.

I have been able to find only one Ohio case wherein a court has construed Section 3969 of the statute. This case was heard by the Court of Common Pleas of Summit County and reported in 4th Ohio Decisions, 329. *State, ex rel, v. The Board of Education of Cuyahoga Falls.*

This was a suit in mandamus, and the writ was allowed to compel the board of education to issue an order for his salary, in favor of a superintendent of the village schools of Cuyahoga Falls, who had been employed by the county commissioners. The board had voted for several applicants, but failed of an election by a tie vote. The court in passing upon the right to a writ of mandamus says:

“Doubtless the board could have elected anybody else superintendent of the schools without let or hindrance from anyone but the board, and it is equally true that they could have determined not to elect a superintendent, or perhaps to abolish the office entirely and conduct their schools simply by the employment of teachers for each school.”

This opinion is in accord with the conclusion of the court in

the case at bar, that the commissioners can act only in the event of the failure of the board to act.

I am of the opinion, therefore, that the board of county commissioners of Champaign County, under the evidence before it on the 17th day of September, was without authority to reinstate these sub-district schools and to employ teachers therefor, and that such employment being without authority in the commissioners, the defendants are without authority to hold possession of the school houses in said sub-districts, and to teach the schools therein.

As to the first ground of the motion, that the petition does not state facts sufficient to constitute a cause of action, the court is of the opinion it is not well founded. The petition not only avers that these defendants unlawfully took possession of the school house in said sub-districts, on the 18th day of September, 1906, and assumed to control the same, but that they have unlawfully assumed authority to teach school in said sub-districts, and have interfered with the plaintiff in its control and supervision of said sub-districts, and the pupils therein, and have interfered with the plaintiff in the supervision, management and control of the schools provided for said sub-districts by the plaintiff.

If the allegations of the petition are true, and the motion, being in the nature of a demurrer to the petition, admits them to be true, the court is of the opinion they state facts sufficient to constitute a cause of action and entitle plaintiff to the relief prayed for.

In the opinion of the court the plaintiff is without adequate legal remedy. A criminal proceeding against the defendants and their arrest could not restore plaintiff to its rights, nor could a proceeding in forcible detention, suggested by counsel for defendants, which might result in restoring plaintiff to the possession of the school house, alone restore it to its right to manage and control the schools of the sub-district. The proceedings before the commissioners were not adversary in their character. The plaintiff, the board of education, was not a party in a legal sense to such proceedings. It had no right to except to the finding and order of the commissioners, and upon such ex-

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ceptions institute proceedings in error. Besides, if it had such right, it could not avail it in this matter. In this state it is well settled that the proceedings and final orders of trustees and county commissioners may be reviewed by petition in error, and reviewed only for error appearing upon the record. Many cases might be cited in support of this proposition. *Haff v. Fuller*, 45th O. S., 495; *Lewis et al v. Laylin et al*, 46th O. S., 663, being in point.

In *Haff v. Fuller* the court say—

“In this state the proceedings and final orders of trustees and county commissioners, establishing ditches and roads, and other boards exercising similar functions, may be reviewed by petition in error and reversed for error appearing on the record.

“The operation of this rule is not extended, however, to where the steps are regular so that the illegality does not appear on the face of the proceedings. In cases of that kind if it be shown contrary to what appears on the record that the board or tribunal proceeded without jurisdiction, injunction may be granted, for there is no adequate remedy at law.”

In the case at bar the steps taken by the commissioners were regular as far as appears from their record, and the illegality complained of by the plaintiff in their proceedings does not appear on the face of the proceedings of the county commissioners, but is shown by the evidence to what appears on the record, and I am therefore of the opinion that injunction is the proper remedy.

The right to injunction in a case similar to the one at bar is upheld by the court in the case of *The Board of Education of Richland Township, Clinton County, v. O. V. McFadden*, reported in 8th O. D., p. 57.

As to the second ground of the motion, that the board of education did not authorize the bringing of this action, there is no record of the proceedings of the board that shows the board at any meeting directed this particular action to be brought, but as the action is brought by the board, in the name of the board, and the testimony discloses that the controversy involves the action of the board in suspending certain schools of the town-

ship, to-wit, Nos. 2 and 12, and the record of the proceedings of the board of education of September 14, at a meeting held subsequent to the suspension of the schools in these sub-districts, and subsequent to a notice served on the board that an application would be made to the county commissioners of the county to employ teachers to continue the schools in these sub-districts, show that the board retained the attorneys appearing for it in this case to represent the board in the legal matters that might thereafter be brought in relation to the suspending of the schools of the township, the court is of the opinion that if it be necessary for the board to have authorized the bringing of this action, and that such authority should appear as a matter of record in the minutes of their proceedings, such authority for the bringing of this suit appears from the action of the board, so taken on the 14th day of September.

The motion to dissolve the temporary restraining order, heretofore granted, is overruled.

E. L. Body and *Buroker & Zimmer*, for plaintiff.

L. D. Johnson, for defendants.

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In re Guardianship of Delia D. Wallace.

APPEALS BY GUARDIANS.

[Common Pleas Court of Lorain County.]

IN RE GUARDIANSHIP OF DELIA D. WALLACE.

Decided, October 10, 1906.

Guardian—Appointment of, without Jurisdiction—Appeal from Order of Removal—Guardian not a Party in a Fiduciary Capacity—Must File Bond.

A guardian who is removed by the probate court because the court had no jurisdiction to appoint him, can not perfect an appeal to the common pleas court from such order of removal, by merely giving written notice to the probate court of his intention to appeal. In such a case he is not "a party in a fiduciary capacity," and does not "appeal in the interest of the trust," and hence is required by Section 6408, Revised Statutes, to file a bond in order to effect an appeal.

WASHBURN, J.

This matter is submitted to the court upon motion to dismiss the appeal in this case from an order of the probate court of this county, removing L. D. Hamlin as guardian of Delia D. Wallace. This motion is made by the Sheffield Land & Improvement Company.

It appears that Mr. Hamlin was appointed by the probate court guardian of Delia D. Wallace, who was a very old lady, and who, it is claimed, has a dower interest in certain property now owned by the Sheffield Land & Improvement Company.

The Sheffield Land & Improvement Company filed a motion in the probate court to remove said guardian, upon the ground that said Delia D. Wallace was at the time of said appointment, and for a long time previous thereto had been, a non-resident of the state of Ohio.

Hearing was had upon that motion, and the probate court being fully advised in the premises, found that said motion was well taken, and said guardian was removed, because of the non-residence of said Delia D. Wallace at the time of said appointment.

That order was made by the probate court on January 9, 1905.

On January 27, 1905, as appears by the certificate of journal entries of probate court, L. D. Hamlin filed a written notice of appeal, and it is claimed that that appeal should be dismissed because no appeal bond was filed by said Hamlin. The notice of the appeal was not signed by L. D. Hamlin, guardian, but by L. D. Hamlin.

The first question submitted is the claim of the attorneys for Mr. Hamlin, that the Sheffield Land & Improvement Company had no right to file said motion in probate court, and has no right to be heard on said motion in this court, because it is not a party interested in the proceedings in the probate court.

I find that, under the law, the Sheffield Land & Improvement Company did have a right to intervene in the probate court, and has a right to be heard in this court.

I will not stop to cite the authorities on that proposition, because that question was involved in the *In re Guardianship of James Murray*, a case recently decided by this court (4 N. P.—N. S., 233; affirmed 8 C. C.—N. S., —).

As I have said, the Sheffield Land & Improvement Company claims that under the provisions of Section 6408 of the Revised Statutes, this appeal was not properly perfected, because no appeal bond was filed.

And it is claimed on the other side, that under the provisions of said Section 6408, no appeal bond was required.

That section, after providing for the filing of a bond within twenty days, by the person desiring to take an appeal, provides that—

“When the person appealing from any judgment or order in any court, or before any tribunal, is a party in a fiduciary capacity, in which he has given bond within the state, for the faithful discharge of his duties, and appeals in the interest of the trust, he shall not be required to give bond, but shall be allowed the appeal, by giving written notice to the court of his intention to appeal within the time limited for giving bond.”

It has been settled by the courts, that to relieve a person from the necessity of giving bond under this section, at least two things are necessary:

First. The party appealing must be “a party in a fiduciary capacity”; and,

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Second. He must "appeal in the interest of the trust." 67 O. S., page 464.

Even where the party appealing is a party in a fiduciary capacity, still a bond is required where he appeals from a judgment affecting adversely his own pecuniary interests. 57 O. S., 289.

All of the cases in Ohio upon this general subject have been cases where the existence of the trust at the time of the attempted appeal has not been in question.

It is difficult to see, in this case, how there could be any trust created by the appointment of a guardian in a matter in which the court had no jurisdiction, because of the non-residence of Delia D. Wallace, or how the appointment or removal of a guardian would in any way be in the interest of such a trust.

But, assuming that the act of the court did create a trust, the existence of the trust was ended by the court before Mr. Hamlin attempted to appeal, and in that event it is quite plain that, under the authorities, Mr. Hamlin did not appeal in a "fiduciary capacity."

The decision of the probate court put an end to the existence of any trust that might have existed before that time, and the finding of the court was, that no trust existed, because it had no jurisdiction to appoint a guardian.

A person can not be said to represent a trust in a fiduciary capacity, when that trust has no existence.

When the probate court removed Mr. Hamlin, he ceased to be guardian, and he could then prosecute his appeal only as an individual, and as an individual, of course, he would be required to give bond.

A case similar in principle, is found in the 36 Pacific Reporter, at page 1059. In that case an administratrix had been appointed of the estate of a person not a resident or inhabitant of the state at the time of his death.

Later on, such administratrix brought suit against a railroad company for causing the death of the intestate, and said company filed a motion to remove said administratrix, and the court determined that the company had sufficient interest in the matter to make it a competent party to institute proceedings

in revocation of the letters of administration; that was done, and the letters were revoked.

Appeal was prosecuted from the order revoking such letters of administration, but no bond was filed; that appeal was dismissed by the district court, and the Supreme Court, in passing upon that dismissal, used this language:

"A sufficient ground for the order of the district court in dismissing the appeal was the omission of the appellant to give an appeal bond. Under the statute, every appellant is required to file in the probate court a bond, in such sum, and with security, as may be fixed and approved by the probate court, conditioned that he will 'prosecute the appeal, and pay all sums, damages and costs, that may be adjudged against him.' The only exception to this rule is that no executor or administrator is required to enter into bond, to entitle him to appeal. The only excuse given for the failure to give an appeal bond is the claim that the appeal was taken by the administratrix, and therefore that she was exempt from that requirement. The difficulty in sustaining that claim is, that her appointment, and everything pertaining to the administration, were utterly invalid. The probate court had no jurisdiction to grant letters of administration, nor to confer authority upon her, and at the time when the attempt was made to take an appeal, the letters had been recalled, and an order and decree entered, declaring the administration, and all the proceedings connected with the same, null and void. In attempting to appeal, she was not acting as the representative of the estate but was merely endeavoring to obtain a personal advantage. Not being an administratrix, it was absolutely necessary that a bond should be given before an appeal could be taken, and her failure to give one is a sufficient justification for the ruling of the court dismissing the appeal."

In the case at bar, the probate court, after finding that the appointment of Mr. Hamlin was illegal, because Delia D. Wallace was not a resident of the state of Ohio at the time of the appointment, made the following order:

"It is, therefore, ordered that the said L. D. Hamlin be, and he hereby is, removed as such guardian, and the guardianship is ordered closed according to law."

So that at the time of the attempted appeal, the guardianship was closed according to law, and no trust existed, and Mr. Hamlin did not appeal in a "fiduciary capacity," and should have given bond.

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There is a later case in the 52 Pacific Reporter, on page 68, that is also in point, the syllabus of which reads:

“An administrator who appeals from an order of removal does not act in his representative capacity in prosecuting such appeal, and is not exempt from giving bond by the last clause of Gen. St., 1889, par. 2977, providing that ‘no executor or administrator shall be required to enter into a bond to entitle him to appeal.’ ”

In that case a son was killed and his mother was appointed administratrix of his estate, and as such instituted an action to recover damages for the death of her son.

Subsequently, the company, sued by her for the death of her son, moved the probate court to revoke the letters of administration, because of the removal of the administratrix from the state. This motion was sustained.

From the order of removal, the plaintiff in error appealed to the district court, which court dismissed the appeal, and from the order of dismissal of the district court, error proceedings were prosecuted to the supreme court, and the court, in sustaining the dismissal, used this language:

“When the order dismissing her was made by the probate court, she was no longer administratrix. Her appeal from that order was not an appeal in behalf of the estate, or in furtherance of the trust she had been filling. Her appeal was the assertion of a personal right only. There is no difference in principle between her case and the case found in the 36 Pacific Reporter, page 1059, in which letters of administration were revoked because the original appointment was void. As is said in that case, ‘in attempting to appeal, she was not acting as the representative of the estate, but was merely endeavoring to obtain a personal advantage.’ ”

These two cases are directly in point, and the principles announced are satisfactory to this court, and are applicable in the construction of our statute (Section 6408), and finding no case to the contrary in Ohio, the order may be made in this case, dismissing the appeal.

James H. Leonard, Chamberlain & Hamlin, for plaintiff.

G. A. Resek, E. G. & H. C. Johnson, for the Sheffield Land & Improvement Company.

**CONTRACTS WITH TAX INQUISITORS AS TO FUTURE
OMISSIONS OF PROPERTY.**

[Superior Court of Cincinnati, General Term.]

THE STATE, EX REL WILSON, v. EUGENE L. LEWIS ET AL.*

Decided October 4, 1905.

Tax Inquisitors—Validity of Contract with—Relating to Future Omissions of Property—Duties of County Auditor—Construction of Sections 1343-1 to 1343-4—Collusion of Officers—Public Policy.

1. The sections of the statutes relating to the placing on the tax duplicate of property improperly omitted therefrom, and the employment of tax inquisitors, etc., do not require of the county auditor as a part of the duties of his office that he shall make search for such omissions; and a necessity existed for the employment of a tax inquisitor for the performance of that work, at the time the contract in issue in this case was entered into, in September, 1902.
2. The phrase "any omissions of property," found in Section 1343-1, was intended to mean all omissions, past, present and future, and the claim that this law does not authorize contracts with tax inquisitors which have a prospective operation is not tenable.

FERRIS, J.; HOFFHEIMER, J., concurs; HOSEA, J., dissents.

This case has appeared in various forms before the general term of this court, and upon the demurrer filed to the petition, disposition of the matter was made on the 27th day of April, 1904, in the following language:

"All the questions presented in this case have been adjudicated by us in *State, ex rel McGoldrick, v. Lewis*, 12 Decisions, page 46; and we are still content with that decision. It follows, therefore, that the demurrer herein filed must be sustained."

The cause was then remanded to special term and permission granted to the plaintiff to amend his petition.

Our attention is drawn by counsel for the plaintiff to the fact that the court expressly passed upon certain allegations in the petition, one of which alleges that the defendant officers authorized and permitted the inquisitor to furnish information

* Majority opinion reversed and minority opinion affirmed--74 Ohio State, ----.

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as to the taxation of property improperly omitted subsequent to the date of the contract of September 17, 1902; and that a proper interpretation of the contract would deny payment for services in furnishing information as to taxable property omitted from the tax duplicate subsequent to September 17, 1902.

Section 1343-1, contains the provision that—

“Certain county officers, when they have reason to believe that there has not been a full return of property within the county for taxation, shall have power to employ any person to make inquiry and furnish to the county auditor the facts as to *any* omission of property for taxation,” etc.

It is contended that the words in this section, “*has not been*” limit contracts made under this provision to the payment of services relating to *past* omissions. A reading of this section does not reveal an intention to limit or confine the activities of the inquisitor by expressed limitation to omissions already made; in other words, to past events. The language of the act gives to the special tribunal, authority to contract “when they have reason to believe”, but nowhere expressly states the time when such action is to be taken, nor to what situation or condition such act shall apply; but the act is explicit in saying that when justified in the belief that there has not been a full return of property within the county for taxation, that “they may employ any person to make inquiry and furnish the county auditor facts as to *any* omissions of property for taxation; and the evidence necessary to authorize him to subject to taxation any property improperly omitted from the tax duplicate.” This language is clear in defining the nature of the contract of employment, and words of broader meaning could scarcely be employed to indicate the extent of the examination thus to be made, the object of which plainly is to secure the collection of public taxes, and must be as broadly construed for the accomplishment of the purpose as follows the rule in the construction of remedial statutes. And when the design and purpose of the act is borne in mind and the conditions to be covered by the statute, and the relief to be afforded by proper application of the rule, it would seem that no narrow construction should be given to the act,

the effect of which might be the defeat of the very object had in the passage of the act.

We pass over the suggestion of collusion between the officers, as furnishing no proper basis for the narrow construction requested.

A proper translation of Section 1343-2 would seem to answer, in a conclusive way, the argument made against the limitation of the contract to past transactions only. In view of the provisions of the last section quoted, the legislative mind would scarcely have used the expression "*any omissions*," as barring therefrom *future* omissions designedly brought about by the collusion of the auditor and the inquisitor.

We think there is no question, therefore, that the term "*any omissions*" was intended to include *all* omissions, *past*, *present* and *future*, as was plainly the intention of the original act (85 O. L., 170) entitled "An act to secure a fuller and better return of property for taxation, and to *prevent* omissions of property from the tax duplicate."

This view is further sustained by the history of the legislation on this subject, and the evolution that began with the act of April 14, 1880 (77 O. L., 205), law of April 14, 1885 (82 O. L., 152), and the act of April 10, 1888 (85 O. L., 170), wherein the language first employed limited the employment to "*any omissions occurring previous to the passage of this act*," while the last expression of the Legislature now under consideration extends the employment to "*any omissions*," etc. The reason at the foundation of the construction here given, is fully set forth in the Crites case in 48 O. S., 142. . .

Our attention has been drawn to the following language:

"That said contract is invalid because under the laws of Ohio it is made the duty of the County Auditor of Hamilton County to ascertain the facts and evidence necessary to authorize him to subject to taxation any property improperly omitted from the tax lists and duplicates of Hamilton county, and to place such omitted property upon the tax lists and duplicates; that the payment to said Henry W. Morgenthauer of any money under said contract for the discharge of such duty would be a misapplication of the public money of Hamilton county, Ohio."

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This necessitates an examination of the statutory duties of the auditor in relation to omitted taxable property, as such duties are set forth in Sections 2781, 2781a and 2782, as well as Section 6044 relating to such property as is set forth in an inventory required by administrators and executors.

An examination of Section 2782 does not, in our judgment, justify the conclusion that it is made the duty of the auditor to make a search for facts and evidence necessary to enable him to add omitted property to the duplicate. And even though that contention or construction be wrong, we are unable to see the force of the objection made under the charge. Section 2782 provides, as a duty of the county auditor, when he has reason to believe, or is informed, that one has given a false return to the assessor, or has omitted taxable items, or has made an erroneous return of his property, that the auditor shall correct the return, and, in so doing, he is *authorized and empowered* to issue compulsory process, but there is nothing in this language *compelling* the auditor to institute such examination. He is obligated to act only when he has reason to believe or is informed that there is a false return, and when informed or having reason to believe, is *authorized and empowered*, but not *commanded*, to issue process for witnesses. Under the contract it is the inquisitor's duty to secure evidence, to appear before the auditor and present such facts to him, for the purpose of carrying into effect the plain objects of such contract, a reading of which leaves no doubt that it becomes the duty of the inquisitor to make search for it, to obtain and investigate the necessary facts and evidence, and present the same to the auditor, who, at such time, would have reason to believe and would be informed as to his duties in the premises. 58 Northeastern Reporter, 260, an Indiana case, furnishes what we believe to be sound reason as applied to this condition.

We do not believe, therefore, that, under these sections properly construed, the auditor is required to make search as part of the duty of his office. And, therefore, we are of the opinion that the contract does not cover duties required of the auditor

in this behalf; and that, therefore, there was a necessity for the employment complained of.

In this view of the case, it does not seem necessary to pass upon the other objections made to this fourth issue.

Demurrer to the amended petition is, therefore, sustained.

Theodore Horstman, for plaintiff in error.

Alfred B. Benedict, for defendants in error.

DISSENTING OPINION.

HOSEA, J.

The question here is whether the contract made by the county officers with Morgenthaler as "tax inquisitor," under Revised Statutes, Sections 1343-1 to 1343-4, on September 17, 1902, is valid as a contract relating to tax omissions occurring in returns subsequent to its date; in other words, whether said law authorizes contracts having a prospective operation.

Various other questions arising upon this or a similar contract with Morgenthaler were disposed of by this court in *McGoldrick v. Lewis*, 12 O. D., 46, but upon a suggestion *arguendo* the court declined to pass upon the question because not raised by the pleadings.

From the majority opinion in the present case, holding that such contracts may have a prospective operation, I am constrained, notwithstanding my high respect for the views of my associates on the bench, to dissent, first, because the language of the statute seems to me to preclude such view; and, second, because, if the language were susceptible of the construction indicated, the general policy of the law is against it.

The language of the statute is as follows:

"(1343—1). [Authorizing employment of tax inquisitors; their compensation.] The county commissioners, county auditor, and county treasurer, or a majority of said officers in any county, *when they have reason to believe that there has not been a full return of property within the county for taxation*, shall have power to employ any person to make inquiry and furnish the county auditor the facts as to any omissions of property for taxation and the evidence necessary to authorize him to subject

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to taxation any property improperly omitted from the tax duplicate, etc.”

(1) As the power to make such contract is wholly derived from statute, the conditions and limitations of the power specified in the statute must be given effect. The subject matter with reference to which the power is given in this instance is defined in the opening sentence of the act stating a contingency which is the condition precedent to the exercise of the power, namely, “When they have reason to believe *that there has not been a full return* of property within the county for taxation, they shall have power to employ any person to make inquiry,” etc.

This language has obvious reference to an existing condition growing out of a past fact, namely a condition arising upon one of the annual returns required by law, previously made.

The common canons of construction require us to refer all relative words and expressions, that follow later in the sentence, back to this dominant subject matter, namely, to the certain specific return, made under the law, which the designated officers have reason to believe is not full and complete. So that the subsequent words, “*any omissions*” and “*any property improperly omitted*,” refer to omissions existing in the return already made; and there seems to me no warrant in the language of the act for any other interpretation.

(2) In tracing the history of the statute, I find nothing to suggest any intention of the Legislature to extend the power of contracting to possible future omissions. The original statute of 1880 (77 O. L., 205) confined its operation to omissions occurring prior to the passage of the act. In the special act of 1885, relating to Hamilton county (82 O. L., 152), the language is, “any property improperly omitted,” which is a common mode of expressing an existing condition, and does not refer to a future possibility. In the present act, passed in 1888 (85 O. L., 170), the limitation is still more specific by stating a condition precedent, namely, “when they have reason to believe that there *has not been a full return*,” etc., which necessarily relates to a past event constituting an existing condition with sole reference to which the power is granted.

(3) Neither do I find in the opinions of the courts upon analogous statutes any support for the enlargement of the present statute by construction.

A question very similar to the present one arose before me in the case of *The State, ex rel, v. Gibson*, under the statute authorizing employment of a private individual to assist the treasurer in the collection of delinquent and forfeited taxes. This court held that the contract must be confined strictly to past forfeitures which was affirmed by the higher courts. *State v. Gibson, Court Index*, July 23, 1903; affirmed in General Term, 1 N. P.—N. S., 565; affirmed by Supreme Court, 70 O. St., 424.

A clearly analogous case is that of *Commissioners v. Arnold*, 65 O. St., 479, based upon the statute authorizing employment of assistants in the collection of delinquent chattel taxes. The Supreme Court lay stress upon observance of statutory conditions, and incidentally lay down a principle having a pertinent application to the present case. In the opinion it is said:

“Statutes enacted for the protection of the public revenues are, usually, not merely directory, but mandatory. * * * Each delinquent list must be read, and an employment made to collect the same; but there can be no employment of collectors to collect future lists. *The employment of such collectors can not be turned into an office to be held to the end of the treasurer's term, or for any definite period.* His employment is to collect the delinquent list which has been read, or some part thereof, and when that is done his employment ends.”

While the opinion is, perhaps, confined to a discussion of the particular law, yet it is impossible to read its clear and forcible language without feeling that beyond its particular application, the court is stating in effect a rule of public policy inconsistent with any enlargement of such powers by construction to include future contingencies, and the clear intimation is that such construction would create an office auxiliary to that of the elective office, for the performance of duties with which the office is charged by general laws.

(4) The foregoing conditions suggest a broader view involving questions of a general public policy.

There can be no question as to the general purpose of our system under which all duties of a public character are assigned

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to only elected public officers. In the matter of taxation, the citizen is required, under suitable penalties, to return his property for taxation, to assessors who have power to correct returns and supply omissions, as to which the auditor has full power of investigation. The auditor is also given a special compensation to bring omitted property upon the duplicate.

I do not concede that the duties of the auditor are perfunctory or merely clerical. In *Probasco v. Raine, Auditor*, 50 O. St., 378, the Supreme Court has spoken upon this subject as follows (391):

"To have equality in taxation all property must be brought upon the duplicate. Some officer must be authorized and empowered to cause all property to be listed for taxation. Such officer must be paid for his services either by fees or salary. The Legislature has full power under the Constitution to say what officer shall perform such duties and in what manner he shall be paid. It has enacted that such duties shall be performed by the auditor, and that he shall be paid as provided in Section 1071," etc.

Contracts of the nature here in question find their justification in the increased complexity and amount of modern business interests and investments and the facilities thereby afforded for escaping taxation; and, so far as they are confined to residual matters which the ordinary public officers have failed to reach and accomplish, after diligent efforts made in good faith to discharge their official duties in the premises, the employment of private assistance is proper and reasonable. Such seems to have been the view of courts in passing upon analogous contracts; but they have confined them strictly to such residual matters. To go further and enlarge the power to include future contingencies, opens up a door to obvious evils that a correct public policy must avoid. It is a step backward in the direction of farming out the collection of the public revenues to private interests, that history warns us against; and I find no authority in this case for supposing that it was the intention of the Legislature to take this step.

For the reasons given, I think the demurrers should be overruled.

EQUITIES BETWEEN SURETIES.

[Common Pleas Court of Defiance County.]

J. H. GARES v. E. F. STEVER.

Decided, June 25, 1906.

Contribution—Settlement Between Sureties—Where the Indebtedness of One is Applied For Relief of the Sureties—Indemnity of One Surety Inures to the Joint Benefit of Both.

One who, being surety with another for an insolvent decedent, and at the same time debtor to said decedent's estate, succeeds in having the whole amount of his debt to the estate applied to the reduction of the decedent's debt upon which he is one of the sureties, and then pays the balance thereof in money, can not compel contribution of his co-surety for more than a moiety of the amount actually paid in money; whatever advantage he gains by the application of his own debt inures to the benefit of his co-surety.

KILLITS, J.

This case, involving less than fourteen dollars, has been fought as if millions were at stake. Gares and Stever were sureties for Partee, on a note for \$100 made to one Patten. Partee, who was a thresher, died insolvent, and from his estate proper, was paid on the note a dividend of but \$18.54, leaving due thereon, with accrued interest, about a hundred and twenty-five dollars. Gares was also debtor to Partee's estate for a threshing bill, and at the time the final dividend was paid by the administrator, on the note, Gares paid his threshing bill, also to be applied on the note. The endorsements on the note, setting these payments up, are as follows:

"Jan. 5, 1903, rec'd from W. H. McCauley, admr. of O. B. Partee, Eighteen & 54-100 the amount that said est. paid on note. Jan. 5, 1903; rec'd from W. H. McCauley, adm. twenty-six and eighty-one cents, said amount paid to adm by J. H. Gares."

The plaintiff's threshing debt to Partee's estate was \$26.81. The testimony of McCauley, the administrator, made it plain that the entire amount of Gares' debt to the estate, instead of swelling the fund available for the payment of dividends, was applied on this note for the relief of the sureties, to that extent, and that no attempt has been made otherwise to collect Gares'

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debt to the estate, the administration of which has been fully settled. Subsequently Gares was compelled to pay the balance due on the note, \$114.20, this being only the amount and interest due after the application of his said debt in full. He now sues Stever, not only for one-half of the \$114.20, but also for one-half of the \$26.81, the amount of the threshing bill.

It is the view of the court that the contention that Gares may get back from his co-surety one-half of his threshing bill credit arises from confusion as to the exact nature of the right of contribution, which rested originally upon equitable principles (*Hartwell v. Smith*, 15 Ohio State, 200) and so generally acknowledged that courts of law assume to imply a contract status to sureties upon the theory that they take upon themselves that position because of the universality of the equitable principle. Brandt on Suretyship, Section 254.

From this it follows, that the right of contribution arises, in law at least, only after payment has been made by one surety in excess of his share, and to the extent, only, that he has paid. Stearns' Suretyship, Sections 286, 288; 9 Cyc., 798, 800; 7 Encycp. of Law, 2d Ed., 332, 342; *Camp v. Bostwick*, 20 Ohio State, 337, 348.

The cases cited in the notes to the texts referred to above, amply support the proposition that in no manner can one surety speculate off of the other. Any indemnity which one surety may get from the principal is for the joint benefit of his co-surety, even if the latter is unaware of the fact; if one discounts the debt in paying, he must share the results of his business acumen with his co-surety; in short, every surety must account to his fellow for every advantage he gets in settling with the creditor. The authorities upon which these propositions are based, and which are referred to in the notes to the text-books and encyclopedias, present such a variety of facts to which the principle was applied, that to hold differently in this case would be both an innovation and a presumption. So far, at least, Gares has actually paid but \$114.20. That amount measures his entire loss by reason of his suretyship. In no sense can it be said that the credit of the threshing bill on the note was a payment by him as surety. He is not out of pocket to any extent by reason of that payment. He but met an obligation that was his alone.

It is made plain from the administrator's testimony that Gares got thereby credit on his debt to the estate. The administrator says that he gave a receipt in full for it. While it may have been irregular for the administrator to apply this threshing bill on the Patten note and not add it to the fund for distribution in dividends, we faild to see how, equitably, Gares can claim advantage to such irregular action, and ask his co-surety to pay him back half of it. Should it happen that the creditors of Partee's estate ever compel Gares to correct the irregular application of his debt, and he be required to pay an additional sum, it will then be time for him to ask more assistance from Stever. We hold, therefore, that Stever may be required to pay but one-half of the \$114.20.

Just prior to the commencement of this case before the justice, in which Gares sued Stever for \$70.50, the latter tendered to the justice sixty dollars, to be used by him, as collector for Gares, having the claim, in paying Gares the half of \$114.20, with the accrued interest. The tender was more than ample to meet Gares' claim, on this basis, with interest and costs. The money being refused by Gares, because half of the threshing amount was not included, it was received back by Stever, and the case was begun and tried out below, without further being done respecting the tender, and a verdict was returned, upon which judgment was entered, in behalf of Gares, for \$57.10. Gares appealed, and after the filing of the petition in appeal in this court, Stever attempted to make his tender good by depositing the amount, \$57.10, with costs, with the clerk of this court. Upon this situation arises a contention over costs. It is the court's opinion that the tender before the justice was ineffective to save Stever the costs there, because the money was not allowed to remain with the court (*Bahmann v. Stoner*, 59 Ohio State, 497); and that all the costs made herein since the appeal, including the costs on the appeal, are to be adjudged to Gares because he recovered no more by his appeal than was awarded him below (Section 6591). The judgment is, then, that Gares recover of Stever the sum of \$57.10 and the costs made in justice's court, and that the plaintiff pay all other costs.

J. H. Hockman and Harris & Cameron, for plaintiff.

John W. Slough, for defendant.

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BOUNDARY LINES BETWEEN CITY LOTS.

[Common Pleas Court of Van Wert County.]

J. W. WILSON AND HELEN WILSON v. GEORGE SIDLE AND ANNA SIDLE.*

Decided, August 30, 1906.

Ejectment—And Adverse Possession—Boundary Lines Where the Original Monuments have Disappeared—Value of Ancient Fences as Evidence—Recent Surveys from an Assumed Starting Point—Presumption as to Different Landmarks and Lines—Constructive Possession—Admission by Holder that it was not Adverse—Notice of Adverse Claim.

1. In a controversy over the location of a boundary line between city lots, the original monument having disappeared, old boundary fences are by far the better evidence of where the lot lines actually are.
2. The presumption favoring the fence as establishing said line is not overcome by the fact that upon a resurvey based upon no original monument another line is established.
3. Where the description shows the boundary line to be a straight line, it is established by the wall of a permanent building standing for the statutory period, even though the building does not extend the entire length of the boundary. The occupancy was such as to give notice of the extent of the adverse claim.

MATTHIAS, J.

This is an action in ejectment. The plaintiffs seek to oust the defendants from the possession of a strip of land twenty-one inches in width off the north end of the south half of in-lots Nos. 63 and 64 in the original plat of the village (now city) of Van Wert. Plaintiffs say that they are the owners of said strip, being seized in fee simple thereof, and that the defendants unlawfully keep plaintiffs out of the possession of said premises.

The answer of defendants contains three separate defenses:

1. A general denial; 2. The statute of limitations as a bar; 3. A contract entered into January 19, 1888, between the defendant, G. W. Sidle, then the owner of the south half of the north half of said lots, and G. M. Saltzgaber, then the owner of

* Error not prosecuted.

the north half of the south half of said lots Nos. 63 and 64, whereby it was agreed that in erecting a brick buidng, then about to be erected by Sidle on his said premises, the south wall thereof, which was to be twelve inches in width, should be constructed on the line between said lots, so that the half thereof should rest upon the premises of said Saltzgaber, and that the said Saltzgaber, his heirs and assigns, should have the privilege of using said wall upon the payment of the reasonable value of the same; that thereupon, said Sidle constructed a two-story brick building with the south wall thereof, a twelve inch brick wall, on and along the line between the lands so possessed by the said Saltzgaber and the said lands of the defendant, Sidle, with six inches thereof resting and standing upon the lands so possessed by said Saltzgaber; that the premises then possessed by Saltzgaber were by mesne conveyances transferred and conveyed to the plaintiffs herein; that the defendant, Anna Sidle, acquired and holds title from and through the defendant G. W. Sidle; that since said time defendants have maintained said party wall so constructed, and that such possession and occupancy by said wall has been open, visible, notorious and continuous, and that plaintiffs have had at all times full notice and knowledge thereof.

The reply denies the averments of the answer. By agreement a jury was waived and case submitted to the court.

For the purpose of establishing the boundary line between the north half and the south half of said lots Nos. 63 and 64, the plaintiffs' measure from the corner of an iron column in what is known as the Kauke building, at the corner of Main and Washington streets. The measurements made by the surveyors, Giffin, Beatty and Ballard, using that iron column as a starting point show that the south line of the defendants' brick building is twenty-one inches south of the middle line of said lots Nos. 63 and 64.

It is conceded that the iron column referred to is not an original monument, nor is it the perpetuation of an original monument. The original monument of the plat of Van Wert was located at the southeast corner of the public square, which the record informs us was 132 feet by 148½ feet, being the lots upon which the court house now stands, "At the southeast

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corner thereof," the record reads, "is planted a white stone about four by ten inches for making future surveys from." This original plat was made in 1835. In lots Nos. 63 and 64 were part of the original plat, as was also in-lot 25 upon which the Kauke Building was constructed in the year 1861. It appears from the evidence that the original monument above referred to was then standing at the southeast corner of the court yard, but when it disappeared we are not informed.

It appears that for some years the Kauke corner has been used by surveyors as a starting point for surveys and measurements, although there is no evidence that such corner was so located and established by reference to the original monument. The first, and in fact the only, record showing the use of the iron column at the Kauke corner as a monument for surveys, is the record of the Frisbie Addition, surveyed and platted in 1873, where it is said that—

"The starting point from which this addition was surveyed and laid out and with which it corresponds, is on the north line of Main street and east line of Walnut street, at the southwest corner of lot 35 in the original plat of said town of Van Wert, which point is recognized as a point to make surveys from in said original plat and in accordance with the survey of this addition. Said southwest corner of said lot 35 is situated 60 rods, 2 feet and 6½ inches east of the southwest corner of the base of the iron column in the southwest corner of the brick building erected on lot No. 25 in said original plat."

We agree with the suggestion made that the fact that the Kauke corner was established and said building erected while the original monument still remained gives rise to a presumption that such corner was located with reference to said original monument, and we find authorities to support this view, from some of which we shall quote further along. It should be observed, however, as we go along, that all that is said upon the subject by the authorities to which we shall refer, is as well applicable to the contention which the defendants make that a similar presumption favors the location of the line claimed by them, for it appears from the undisputed evidence that prior to 1865, a board and post fence extended east and west on a line between the north half and south half of said lots, and

that upon the line of such fence the former as well as the present building was constructed.

In the 69th Mich., 333, it is said:

“Ancient fences used by a surveyor in attempting to reproduce an old survey are strong evidence of the location of the original lines, and if they have stood for twenty or thirty years, should be taken as indicating that such lines as against evidence of a survey ignoring such fences, and assuming a starting point at a certain street because agreed upon by surveyors as the true line.

“It will not do to permit boundaries to be disturbed and moved upon a survey made from an assumed starting point, without some proof of its being a true line located and fixed by the original survey and upon which parties may have acted and made valuable improvements.

“In the absence of original monuments, evidence is admissible of the location of lots and blocks, and lines and corners of lots and blocks thereby established as indicated by old fences, old buildings and the streets as laid out and used for many years, and stakes and monuments established by former surveyors.” 97 Wis., 399. See, also, 39 Mich., 601; 102 Mich., 417; 31 Mich., 270; 49 Mich., 59; 85 Wis., 80; 115 Wis., 1; 80 N. W., 115; 96 Wis., 346.

While we do not find it necessary to decide the question as to whether the monument at the Kauke corner has such a presumption in its favor as to warrant its use as a starting point for surveys in the city of Van Wert, because of other questions appearing in this case, yet we have attempted to go into the question for the reason that it has been a rather mooted one. The same question has appeared in other controversies which have found their way into this court, and I think, invariably the matter was left undecided and unsettled. All the authorities agree that under circumstances such as presented in this case, it is the duty of the surveyor not to determine the location of lots or lot lines by an absolutely accurate survey; that the question is not how an accurate survey would locate them, but how the original stakes located them. No rule is more inflexible in real estate matters than that monuments control course and distance. Justice Cooley, in 39 Mich., 601, above cited, says:

“The city surveyor should, therefore, have directed his attention to the ascertainment of the actual location of the

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original landmarks, and if those were discovered they must govern. If they are no longer discoverable the question is where were they located, and upon that question the best possible evidence is usually to be found in the practical location of the lines *made at a time when the original monuments were presumably in existence and probably known.*"

But it is also said by the same eminent justice:

"As between old boundary fences and a survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of the lot actually are."

It will be seen that the rule thus clearly stated under the evidence appearing in this case, probably justifies the use of the Kauke corner as a monument from which to make measurements and surveys; but if measurements made from that corner, from that monument, conflict with the lines of lots also in the original plat of the town fixed and established at about the same time, and fences constructed to mark such lines, why should the one have preference? The same evidence which shows that said original monument remained in its place at the corner of the court yard after the Kauke corner was located, shows also that it was there after the time when, according to positive evidence, the fence marking the disputed boundary was located and constructed. It appears, further, that a stake was planted at the last named location at the west end of said fence, which stake was pointed out to Mr. Sidle at or prior to the time of his purchase of said premises. The fence was constructed some time prior to 1865, and was maintained until 1883, or rather a part of it, possibly half across the lots, frame buildings having been placed upon the north lot, which belonged to Longsworth, and extended to the line of said fence. In 1865 and for some years thereafter, the north half of said lots belonged to Longsworth and the south half to Clark. From 1865 until 1873, Longsworth lived on his part of said lots, and said fence extended, we are told by Mrs. Longsworth, across the lots dividing their portion from that of Mr. Clark. Just when any portion of said fence was removed or was destroyed, and said buildings placed on the Longsworth lot is not disclosed. We find them there in 1882. The following year said premises, that is, the south third of the north half of said lots, was purchased by defendant, G. W.

Sidle, from Longsworth. At that time two small frame buildings occupied the front of said premises and extended to the disputed line, possibly beyond. At some time prior to that a brick building had been erected upon the middle third of the north half of said lots. This is known as the Alexander lot. In 1883, Sidle caused to be constructed a frame building in the rear of his south room. This room was from twenty-five to twenty-nine feet in length, the old room in front of it being probably fifteen feet east and west. At the time said room was erected it was so located that the south wall thereof, was twenty-four feet south of the Alexander Building and in line with the remainder of said fence. It further appears that in the rear of the Sidle lot, possibly ten or twelve feet from the east end thereof, stood an ice house which was also on a line with said fence and from which the fence extended east some distance. Thus according to the evidence, was the Sidle lot occupied and used until the year 1888, when the frame buildings, except the ice house, were removed to make place for the brick business building which now stands on said lot, eighty feet east and west. It appears from the evidence, that the stake before referred to, was found in 1888 when the excavation was made for the south wall of the brick building and that it stood twenty-four feet south of the Alexander building.

Thus it appears that the line claimed by Sidle and his predecessor in title as the line between the north half and the south half of said lots was the line of the old fence—twenty-four feet south of the Alexander building—and that such line was claimed together with some occupancy or visible sign of such claim from 1865 until the present time. The measurements made by the surveyors and shown upon the plat introduced in evidence by the plaintiffs, rather supports the defendants in this contention that such has been claimed and considered to be the true line, if not acquiesced in. This plat shows that, whereas the original plat of Van Wert indicates that the lot on the corner of Main and Washington streets is but 132 feet, its south line as built upon and occupied is .85 of a foot further south. It further shows that the alley is but .05 of a foot short of its platted width; that the building next to the alley occupies .66 of a foot more than its twenty-two feet, while the Alexander building oc-

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cupies but 20.17 feet. It appears from the evidence, that when the Alexander building was erected a strip two feet wide was left on the south side thereof for the purpose of a joint stairway, further appears that such arrangement was carried out, and that a joint stairway was constructed when the Sidle building was erected by which access is had to the second floor of the Alexander as well as the Sidle building, there being a front as well as rear stairway and a hall the full width of four feet the entire length of the buildings east and west on the second floor. If we take this fact into consideration, and we think it must be considered, then we find that this 1.83 feet, which it is said is the distance the Sidle building is too far south, is exactly the extra space used and occupied by buildings north of the Sidle building. For the purpose of showing this more fully, let us take first the distance as shown by the original plat of Van Wert, commencing at the Kauke corner.

Platted distances.

Main street.....	82.50
In-Lot No. 54.....	132.85
Alley	16.5
North Half of 63 and 64.....	66.

Measurements of lots as occupied.

Main street.....	82.40
In-Lot No. 54.....	132.85
Alley	16.45
First building on 63 and 64.....	22.66
Alexander building.....	20.17
From Alexander wall to south line <i>Sidle</i> bldg.....	24.30

 298.83

 297.00

 1.83

I have said that these measurements serve to support the contention of the defendants that the line has been claimed and maintained where the south line of their building now stands, or rather six inches north thereof. Let us note the fact that although lot 54 takes .85 of a foot (or 10.2 inches) more than the original plat gives it, yet the alley next south loses but .05 of a foot (.3 of an inch); thus it is seen that the alley

line according to this measurement would be practically ten inches further south that is should be according to the original plat. We are not enlightened by the evidence adduced as to the time of occupancy of said lot 54 or when the building was erected thereon, or when the building was erected next south of the alley, nor the one on the Alexander lot. We only know that the Alexander building was erected before the Sidle building. But from the evidence before us we think we may presume that the lot fronting upon Main street was built upon first, and lots near thereto before those further away, and that as this was done lines were established, fences erected thereon, and later buildings erected in accordance with such lines. If then a mistake was made in the measurement of lots next to Main street, giving them more than they were entitled to according to the original plat, does it not seem quite probable that the line between these lots was established when and where claimed by the defendants? According to the measurements above stated the Alexander building and the Sidle building together occupy just .03 of a foot less than the 44 feet to which they are entitled.

If the extra space given lots next to Main street was not the result of mistake in measurement but rather of appropriation by the owners of the lots, then does it not still seem quite probable that owners of lots should locate their property lines by measurements from lines heretofore established and marked? This especially in view of the fact that the monuments from which such measurements would be made were north of said lots. We think such presumptions may be indulged and such conclusions rationally drawn from the evidence.

This brings us back to the rule laid down by Justice Cooley, which we find is adopted and followed by other authorities cited:

"As between old boundary fences and a survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of the lot actually are."

As supporting our conclusions in this regard we also refer to 96 Wis., 346, where it is said:

"The presumption that a fence which has stood for thirty years is located on the line of the original survey is not overcome

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by the fact that upon a resurvey based upon no original monument another line is established."

Also,

"A boundary line long recognized and acquiesced in is generally better evidence of the real line than any survey made after the original monuments have disappeared." 28 Kan., 665; 102 Mich., 417.

This brings us to the claim of adverse possession, and we are of opinion that such defense is well asserted and established in this case, even if the line in dispute be located according to the survey now made. The facts show that the line established and claimed from 1865, was 24 feet south of the Alexander wall. Defendants and their immediate grantor had held possession to that line from 1865, so that such title ripened in 1886, prior to the removal of any buildings from the Sidle lot. But it is contended that the evidence does not show that Sidle's Buildings and fence extended the entire length of the line, and, that therefore, there was not the hostile and exclusive possession required to result in a bar by the statute of limitations.

It is a rule generally recognized that one in possession can acquire title by adverse possession only of the land actually inclosed and occupied by him unless he have color of title, but that if a man enter a tract of land and under deed duly recorded, although from one having no legal title, and has a visible occupation only of part of it, the true owner is disseized of the whole tract. Said in *Humphreys v. Huffman*, 33 O. S., 404, that:

"The ground upon which the doctrine of constructive possession is based is, that one in possession, claiming by metes and bounds under a paper title, and openly and notoriously exercising control and dominion on the land, is presumed to be doing so to the extent of his claim. * * * the occupancy must be such as to give notice to the real owner of the extent of the adverse claim."

This is undoubtedly the correct rule to apply in the case at bar. Defendants' deed calls for the south third of the north half of the said lots. Under this deed they have claimed their south line to be twenty-four feet south of the Alexander wall and extending east and west. The description, together with

the plat, shows that wherever the disputed line is, it is a line due east and west without curves or jogs, and hence occupancy to the line claimed both in front and rear was such occupancy as to give notice to the owners of the south half of lot that the adverse claim extended entirely across the lots.

"The principle upon which the limitation operates is that the adverse claim is accompanied by such an invasion of the rights of the opposite party as to give him a cause of action, which he has failed to prosecute within the time limited by law, and which he, therefore, is presumed to have surrendered or abandoned." *Clark v. Potter*, 32 O. S., 63; Angell on Limitations, 390.

We think this view is not inconsistent with any reported Ohio case, and we find it supported by the Supreme Court of Iowa in the case of *O'Callaghan v. Whisenand*, 93 N. W., 579 (119 Iowa, 566) a comparatively recent case, having been decided in 1903.

Owners of adjoining business lots in the city of Des Moines joined issue as to the location of their boundary line, the difficulty having grown out of conflicting surveys. Defendant's grantor, in 1873, erected a business building upon this lot, locating his wall according to a survey then made. In 1890, plaintiff came to erect a new building on his lot, employed an engineer, who upon survey determined that defendant's building was over the line, whereupon action was brought. We quote from the text of the decision:

"If he (plaintiff) intended to question the correctness of the location of the line, he should have acted within ten years after he knew that defendant was claiming and exercising the right of possession to that line, even though the original occupancy on the part of the defendant's grantor was by mistake, yet from the time that he definitely fixed upon this line as his boundary line, and asserted the right to possession with reference thereto, his occupancy was up to that particular line, and not up to some imaginary line, which might afterwards, by survey, be established as the correct line according to the original survey and plat. In other words, his possession was not from that time on, by reason of any mistake, but by reason of the contention that that was his boundary.

"It is further contended by plaintiff, however, that the permanent building erected by Bird (defendant's grantor), on what he believed to be his eastern boundary line, did not ex-

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tend the entire length of the boundary, and that as to the line beyond the building there has been so much adverse possession or acquiescence as to conclude the plaintiff. We see no merit in this controversy. It is clear that the boundary line was supposed to be a straight line, and that it was established by the wall of the permanent building as effectually as though the building had extended the entire length of the line. There is no contention that there should be any jog or off-set in the boundary between the two lots. When Bird's building was constructed on the boundary line as he claimed it to be for a considerable distance, he was asserting right of possession to that straight line as effectually as though his building had covered the entire depth of his lot."

In the case before us, to repeat some of the evidence, it appears that the line claimed by the defendants was for many years marked by a fence extending across the lots and that a part of the fence remained for more than twenty-one years, marking the line claimed and along which the frame, and afterward the brick building, was located. The occupancy was such as to give notice of the extent of the adverse claim.

But it is urged that in 1888 Sidle and Saltzgaber entered into a contract whereby it was agreed that the south wall of the Sidle building was to be so located that it would extend but six inches south of the middle line of said lots, and that any rights theretofore acquired by Sidle were thereby surrendered. This contention is met by the rule that the location of the line is to be determined by the fence and stake referred to, rather than by measurements made now from a point other than the original monument. Upon this point in addition to authorities previously cited, we call attention to 92 N. W., 704, where it is said:

"The fact of possession becomes of importance when the fact is considered that none of the original monuments, if any, marking the location of the block or street in dispute, has been preserved; and that no living witness is able to identify the place where such monuments were platted. * * * there attaches to lines so long recognized a presumption of correctness, which if not conclusive, is to be overcome only by clear and satisfactory proof."

It is clear that Sidle then considered the boundary line referred to in said contract to be as he had theretofore, and has

since claimed to be, and where title has become perfect by adverse possession for the statutory period, it is not lost by an admission by the holder that the possession was not adverse, although the admission be in writing, or by an agreement to join in a survey. Cyc., Vol. 1, p. 1139; 103 Mich., 501; 52 Am. Dec., 618; 86 Am. Dec., 703.

Even if the adverse possession had not continued for twenty-one years, prior to 1888, which we think clearly it had, still the temporary vacancy when moving off the old and erecting new buildings would not constitute an interruption of possession, when there was no intention to abandon possession. Cyc., 1, 1021; 32 O. S., 65.

The conclusions reached and above announced, we believe to be in complete harmony with the latest reported decision of the Supreme Court of this state upon the subject of adverse possession, that of *McAllister v. Hartzell*, 60 O. S., 69.

Upon the issues joined we, therefore, find for the defendants and dismiss the petition herein, and assess the costs to the plaintiffs.

Dailey & Allen, for plaintiffs.

T. J. Trippy and *W. F. Corbet*, for defendants.

LIMITATIONS ON MUNICIPAL BONDING POWER.

[Common Pleas Court of Mercer County.]

J. F. SMITH, A TAX-PAYER, ETC., v. THE VILLAGE OF ROCKFORD, OHIO, ET AL.

Decided, September 14, 1906.

Municipal Corporations—Application of the Longworth Act to Street Intersection Bonds—Limitation of Indebtedness which May be Incurred in One Fiscal Year—Without Authorization by the People—Injunction.

Bonds issued by a municipality, sometimes called "intersection bonds," to pay the corporation's share of sewer and street improvements, and to be paid for by general taxation upon all the taxable property within the municipality, come within the limitations and restrictions of the Longworth Bond Act (Section 100 of the Municipal Code and Sections 2835, 2835b, et seq., Revised Statutes, as

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supplemented and amended in 1904 and 1906), and hence the total aggregate issue of such bonds and other bonds coming under the Longworth Act must not exceed the one per cent. limit in any one fiscal year, without submitting the question of such issue to the vote of the people.

CUNNINGHAM, J.

Heard on motion to dismiss temporary injunction.

It is unnecessary for the court to enter into a discussion of the case tendered by the petition in its entirety, but I will content myself by stating enough of the issue to apply conclusions to which I have come.

The village of Rockford, Mercer county, Ohio, has an entire tax duplicate of about \$360,000; one per cent. of which would be \$3,600. The town council of that village has determined to improve two certain streets therein, and build certain sanitary sewers; the streets to be paid for by assessment upon the abutting property, and by the village, under Section 53 of the municipal code, and the sewers by assessment upon the property benefited, and by the village likewise.

It will be necessary for the village, in order to pay for its share of these improvements, to issue its bonds for substantially the sum of \$17,000, which it is proceeding to do; and has sold, but not yet delivered, said bonds.

The question as to whether or not said improvement should be made, or said bonded indebtedness created, was not submitted, under the statute, to the voters of said municipality. The plaintiff claims that it is beyond the power of said village to create said bonded indebtedness, without submitting the same to a vote, because such act will be in violation of Section 2835 of the Revised Statutes of Ohio, which is now substantially, Section 100 of the municipal code. The defendant claims that the council has within its power, and depended for that power upon a provision of Section 53 of the municipal code, which directly provides that the council has the power to make the improvements herein contemplated, and shall have the power to issue its bonds to raise the money to pay for the city's share of said improvements and to build the intersections.

These two sections appear to directly conflict; Section 2835 interfering, under the state of facts before us, with the carrying

out of the provisions of Section 53. The plaintiff says that the two sections must be construed together and that, so taken, mean that the city can issue its bonds, as provided by Section 53, when such act does not violate the provisions of Section 2835. The defendants urge that Section 53 operates as an exception to the rule laid down in Section 2835; or, rather, that the indebtedness described by Section 53 is not contemplated by Section 2835, and is not of the class governed by said last mentioned act. As the court determines which of these contentions is right, so must his conclusion follow as to what his order should be in this case.

The question here involved is of exceeding importance. The court feels very much embarrassed in passing upon the question raised, for the reason that another judge of this sub-division has passed upon the question substantially, as has at least one other and able judge of common pleas in the state. This case was argued very fully. Counsel on both sides seem to have been impressed with the importance of the question raised, and I have, to the best of my ability, carefully examined the briefs filed, and carefully weighed the argument and confess to a very great uncertainty as to what the legislative intent in this case was.

A court should not interfere with the efforts of a municipality to improve, thus interfering with the right of a municipality to govern itself, unless some one's right is being interfered with, and the intent and meaning of the law not being carried out. I can not agree with the reasoning of Judge Bigger, whose decision upon this question has been submitted to me, and which decision is carefully and well considered, for the reason that he seems to base his conclusion flatly upon one proposition, and that is, that what he terms "intersection bonds" do not come under the class of bonds described in Section 2835. He does not explain, in his decision, why they do not. That act (Section 2835), in describing the bonds to which it refers, use the definition, "Bonds for re-surfacing, repairing, or improving any existing street, or streets, as well as other public highways," and that is exactly the kind of bonds involved in this action. Intersection bonds, as that court calls them, are bonds issued for the purpose of raising money to build intersections of streets as a part of

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an improvement upon those streets; and, further than that, raise the money to pay the city's share of not less than 1-50th of the entire cost of the improvement outside of the intersections.

I, therefore, believe that that kind of a bond is controlled by Section 2835. I, therefore, believe these two sections of the statute only apparently are in direct conflict. I believe Section 2835 to be a general statute by which the Legislature intended to control the action of town councils in their expenditures, and that all their expenditures, for the purposes named in that statute, are controlled in that act, unless explicitly excepted by the special act providing for them.

I confess that the application of that act tends to delay corporations in carrying out the improvement of its streets. My first impression was, that had the Legislature intended the bonds described in Section 53 to be governed by the provisions of Section 2835, it would have taken the pains to directly provide for the issuance of bonds, as it does in Section 53, and I was inclined to think that the proper method of construing these statutes was to hold that Section 53, having been passed *after* Section 2835, although the latter was re-enacted at the same time as the former when they were both carried into the municipal code, so-called, could be treated, under a familiar rule, as having been intended by the Legislature as an exception. But in examining the act, at page 516 of O. L., Vol. 97, on page 520, and applying there that same rule, I find that Section 2835 has been, since the passage of these two acts as above referred to, supplemented as Section 2835*b*; and, I believe that I am relieved from further examination into the construction that ought to be given these two laws by that supplement. I believe that in that supplement the *Legislature has itself construed* these sections. It reads as follows:

"Provided further, that the limitations of one per cent. and four per cent. prescribed in Section 2835, shall not be construed as affecting bonds issued under authority of Section 2835, upon the approval of the electors of the corporation. *Nor shall bonds which are held to be paid for by assessments specially levied upon abutting property be deemed as subject to the provisions of said section.*"

As is shown by that supplement the Legislature had under consideration at the time of its passage, the bonds authorized by Section 53, and they undertook to say what bonds described in Section 53 shall not be subject to the provisions of Section 2835, and do not include in said list, bonds that are to be paid by general taxation. The bonds under discussion in this case are not to be paid by assessments specially levied upon abutting property, and, therefore, do not come within the provisions of this supplement.

I can not read this amendment, or, rather, supplement, in any other way than that it is an act by which the Legislature undertook to say just what part of the bonds contemplated by Section 53 should be relieved from the operation of Section 2835, and that it did not include bonds of the character that are here in controversy.

It, therefore, follows that the plaintiff is entitled to at least some of the relief prayed for in his petition, and that the temporary injunction heretofore granted should be continued in force, enjoining the defendant, the village of Rockford, its council and officials, from executing and delivering the bonds described in the petition, or from borrowing money to build the improvements described in the petition, until a fund for the payment thereof is provided according to law; and that the contractors be enjoined, as prayed for in the petition, from carrying out their contracts until a fund is provided according to law to pay them; which, of course, can be done if the voters of said municipality, under statute, authorize it.

The court feels that all of the parties in this case ought to be protected, and the continuance of the temporary injunction in force is conditioned that the plaintiff shall furnish an undertaking, for the benefit of all the defendants, in the sum of \$7,000 to the satisfaction of the clerk.

Layton & Son. and John W. Lorce, for plaintiff.

J. D. Johnson and E. E. Jackson, for defendants.

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CONSTITUTIONALITY OF THE COUNTY DEPOSITORY ACT.

[Common Pleas Court of Summit County.]

THE STATE OF OHIO, EX REL ALVIN D. ALEXANDER, v. L. H. OVIATT, EVER HAWKINS AND PHILIP WAGONER, AS COMMISSIONERS OF SUMMIT COUNTY, OHIO, AND FRED E. SMITH, AS TREASURER OF SUMMIT COUNTY, OHIO.*

Decided, September 17, 1906.

Constitutional Law—Discrimination Against Persons and in Favor of Corporations—Uniform Operation—Corporate Banks Preferred Over Private Banks—When a Bank is "Situated" in the County—"Inalienable Rights" and "Equal Protection of the Laws"—Relate to Private, Personal, Civil or Political Rights of Natural Persons Only.

1. The Ohio act providing for county depositories (98 O. L., 274) is not in contravention of Sections 1 or 2 of Article I of the state Constitution, or of the Fourteenth Amendment of the Constitution of the United States, by reason of the fact that it discriminates against natural persons and in favor of banks and trust companies.
2. Nor does this act fail of uniform operation throughout the state by reason of the provision that in counties where there are located banks or trust companies incorporated under the laws of the state of Ohio or of the United States, such banks only shall be regarded as eligible to bid for and receive the county funds, but in counties where there are no such banks located, private banks may be awarded these funds.
3. The Cleveland Trust Company, having its situs for taxation, executive management and business administration in Cuyahoga county, can not by reason of the fact that it maintains a branch bank in Summit county be regarded as "situated" in Summit county within the meaning of this act, nor is the manifest purpose of the act to keep the public funds of a particular county within the natural and usual channels of trade in that county, subverted by an award of these funds to a bank situated in another part of the state.

WANAMAKER, J.

On the 25th day of July, 1906, the relator filed his petition in the court of common pleas averring for his cause of action, that he was a resident and tax-payer of Summit county, Ohio,

*Affirmed, *State, ex rel, v. Oviatt et al*, 8 C. C.—N. S., 567.

and that on the 23d day of July, 1906, the said commissioners of Summit county, pretending to act in pursuance of law, awarded to the Cleveland Trust Company, of Cleveland, Ohio, a corporation, the use of the money of said county for the period of three years, said award having been made by said commissioners in pursuance of an advertisement duly made inviting sealed proposals from banks and trust companies for the payment to said county of interest for the use of the money in said county; that in answer to said advertisement the said the Cleveland Trust Company bid for the use of said money for said period of three years at the rate of 3.32 per cent. per annum, being the highest bid made; that in further answer to such advertisement, a large number of incorporated banks and banking institutions, located in Summit county, bid for the use of such money a rate of more than two per cent. per annum, said banks so located in Summit county and so bidding as aforesaid being more than sufficient in number to use all of the money of said county coming into the hands of the county treasurer from time to time.

Said relator further says, that said the Cleveland Trust Company, is a corporation of the state of Ohio; with its office, location, residence and principal place of business in the city of Cleveland, Cuyahoga county, Ohio, and that it is not competent and eligible to bid for the use of said funds when there are the required number of incorporated banks and trust companies located and doing business in Summit county, Ohio, which bid two per cent. or more for the use of said funds.

Said relator further says that the said commissioners are about to enter into a contract with the Cleveland Trust Company for the use of said county money, and will, unless restrained by this court, accept and approve an undertaking on the part of said trust company for said moneys to the amount of four hundred thousand dollars.

Said relator further says that the act of the General Assembly, under which said commissioners have pretended to act, was unconstitutional and void, in that the said act discriminates in favor of incorporated companies and trust companies as against natural persons and unincorporated banks, trust com-

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panies, and banking institutions; that the said act and award and proposed contract and order of the said county commissioners, and the said contemplated act and delivery of money by said county treasurer are illegal and void, for the reason that the said the Cleveland Trust Company is not a resident or situated in Summit county, Ohio, and that the said commissioners are unauthorized and unwarranted in making any award to said trust company, or entering into any contract with it in reference to and trust companies situated in Summit county, Ohio, that have bid for the use of said money, to use, consume and cover all of the said county money.

The relator further says, that the necessary notice, in writing, was served upon the prosecuting attorney of said Summit county to institute this action for the purpose of preventing and restraining said county commissioners from awarding the funds to said the Cleveland Trust Company, and to restrain and prevent said treasurer from paying over and delivering to said the Cleveland Trust Company said moneys under said pretended law.

The defendants, by their answer, and by their admissions in open court, say that they are the commissioners and treasurer of Summit county, respectively, and that the relator is a resident tax-payer of said Summit county, and that the commissioners, by resolution, awarded to the Cleveland Trust Company, a corporation under the laws of Ohio, the use of the money of said county to the extent of four hundred thousand dollars, for the period of three years; that such award was made pursuant to an act of the General Assembly, passed April 2, 1906, found in 98 O. L., 274-279; that said the Cleveland Trust Company is a corporation, duly organized and existing under the laws of the state of Ohio, having its principal place of business at No. 1 Euclid avenue, in the city of Cleveland, Cuyahoga county, Ohio; and that said trust company has and had at, and prior to the time of making the bid referred to in the petition, a bank situated in the county of Summit and state of Ohio, to-wit, in the village of Hudson therein; that said bank in said village has a full complement of officers and agents, and there transacts its general banking, trust and savings business,

Defendants further say that the bid so made by the Cleveland Trust Company was the highest and best bid for the use of the funds of said county; and admits the preliminary notice in writing, required by law, was made upon the prosecuting attorney as alleged in the petition. The reply is a general denial, save and except such things as are admissions of the matters set forth in the petition.

The issues growing out of the pleadings, the admissions and waivers made by the parties to this cause in open court, resolve themselves into two propositions:

First. Is said act of the General Assembly providing for county depositaries, as found in 98 O. L., 274-279, unconstitutional by reason of Sections 1 and 2 of Article I of the Constitution of the state of Ohio, and Section 26 of Article II of the Constitution of the state of Ohio.

Section 1 of Article I, commonly spoken of as the Bill of Rights of the Constitution of the state of Ohio, reads as follows:

“All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possession, and protecting property, and seeking and obtaining happiness and safety.”

Section 2, Article I, reads as follows:

“All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary;” etc.

Section 26, Article II, reads:

“All laws of a general nature shall have a uniform operation throughout the state;” etc.

The relator claims that the right and privilege of acquiring and possessing property, as defined by Section 1, Article I, and and the right to equal protection and benefit, under favor of Section 2, Article I, are denied to natural persons by the provisions of the so-called county depositary law, which limits those eligible to bid for and receive the county funds to “a bank or banks or trust companies * * * duly incorporated

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under the laws of this state or organized under the laws of the United States."

The relator further claims that the reason Section 1 of said depository law providing, "where the county seat in any county has no bank of the description as defined in Section 1 of this act, that any private bank may be authorized to receive such funds, provided they give security to sufficiently cover such deposit," etc., and that by reason of the fact that a private bank is eligible to bid for and receive such county funds in some counties of the state where no incorporated banks are situated, and private banks in other counties where incorporated banks are situated, are not eligible to bid for and receive the award for such funds, that this would be such a failure of uniform operation in a statute dealing with matters of a general nature as to be violative of said Section 26, Article II, of the Constitution of Ohio.

In addition to the constitutional questions, there is raised the mixed question of law and fact as to whether or not the Cleveland Trust Company, which has its principal place of business located at No. 1 Euclid avenue, Cleveland, Cuyahoga county, Ohio, and a branch bank doing business in Hudson Village, Summit county, Ohio, is situated in Summit county, Ohio, within the provisions of the depository act.

It is rather surprising to find that while a large number of states have had, for a long term of years, depository laws similar to the Ohio statute in question, there have been no adjudications upon constitutional questions of a like character to those that have been raised in this case; and the fact that such statutes in other states have been so long acquiesced in by the public without questioning their constitutionality in these respects, would certainly lead the court to hesitate and to act with much reluctance in declaring such a statute unconstitutional. The public policy of abundantly protecting the public funds and providing for their earning a fair interest during the period that they may not be required for purposes of disbursement, and furnishing the business public with needed capital for the usual and customary purposes of trade and commerce, are so manifestly wholesome and in the interests of the public

welfare, as to advise judicial sanction unless clearly and manifestly prohibited by constitutional limitations.

The presumption is always in favor of the validity and constitutionality of the law; and it is only when a manifest assumption of authority and a clear incompatibility between the Constitution and the law appear, that the judicial power will refuse to execute it. Judge Renney in *C., W. & Z. R. R. Co. v. Commissioners of Clinton County*, 1 O. S., 77; and many other Ohio cases to same effect. While this is a mere legal axiom, its foundation, reason and necessity are of interest.

"The Legislature, in the first instance, is to be the judge of its own constitutional powers. Its members act under an oath to support the Constitution, and are in every way under as great a responsibility as judicial officers. Their manifest duty is never to exercise a power of doubtful constitutionality. Doubt, in their case, as in that of the courts, should be conclusive as against all affirmative action. This being their duty, we are bound, in all cases, to presume that they have regarded it; and that they are clearly convinced of their power to pass a law before they put it in the statute book. If a court, in such case, were to annul the law while entertaining doubts upon the subject, it would present the absurdity of one department of the government overturning in doubt what another had established in settled conviction, and to make the dubious constructions of the judiciary outweigh the fixed conclusions of the General Assembly." 1 O. S., 83.

No question is raised that the subject-matter involved in the legislation in question, is not within the legislative power of the General Assembly. The General Assembly's legislative power is almost plenary and absolute. Section 1, Article II of the Constitution of Ohio reads: "The legislative power of this state shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives."

"It will be observed that the provision is not that the legislative power, as conferred in the Constitution, shall be vested in the General Assembly, but that the legislative power of this state shall be vested. That includes all legislative power which the object and purposes of the state government may require, and we must look to other provisions of the Constitution to see how far and to what extent the legislative discretion is qualified or restricted." *Baker v. Cincinnati*, 11 O. S., 534-542.

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“Such prohibition must either be found in express terms, or be clearly inferable, by necessary implication from the language of the instrument when fairly construed according to its manifest spirit and meaning.” *Cass v. Dillon*, 2 O. S., 607; *Evans v. Dudley*, 1 O. S., 437; *Lohman v. McBride*, 15 O. S., 573-592.

Do either of the three sections of the Constitution called in question in this case expressly or by clear inference prohibit the enactment of the statute in question; or, are the terms and provisions of the statute, so far as applicable to the case at bar, merely a matter within legislative discretion?

A county is merely one of the political subdivisions of the state, created only for public purposes, to facilitate and promote the administration of the state government (*Board of Supervisors of Sangamon Co. v. City of Springfield*, 63 Ill., 66; 11 Cyc., 65). It is not a public corporation as is a city or village, it is not vested with a single attribute of sovereignty, but is merely a territorial division of the state for purposes of political organization and civil administration in public affairs. 1 O. S., 77.

When the tax-payers of the county have contributed to the county treasury such sums as are lawfully assessed against them, the fund so created has become the property of such county or political subdivision of the state, and the individual taxpayer has lost substantially all right, title and interest in and to said fund, save and except what he may have in order that such fund may be applied only for the purposes for which it was levied and collected, or for such purposes as may be authorized by law in the county treasury, it is the property of the state, or rather of a political subdivision of the state—a county.

Does either Section 1 or Section 2 include within its terms and provisions, either expressly or by necessary implication, the state of Ohio as a unit or any of its political fractions such as a county? A careful reading and consideration of those sections finds the word “men” used in the first section, referring manifestly to natural persons and such artificial persons as private corporations who are similarly situated with respect to the subject-matter under consideration. Section 2 used the word “people” as synonymous with men, and evidently equal in scope

and comprehension, and has substantially the same application. In both sections the term "inalienable rights" and "equal protection and benefit" relates to private, personal, civil or political rights of natural persons only, which by force of legislative enactment and judicial interpretation has been extended to private corporations similarly situated with reference to the subject-matter under consideration. But the court is unable to find any authority or adjudication whatsoever that has undertaken to extend the provisions of these sections to a state or any of its political subdivisions.

The court, therefore, holds that so far as Section 1 and Section 2, Article I of the Bill of Rights, are concerned, that they are in no way violated or infringed upon by the legislative act in question; for the subject-matter of the statute in question is the county funds, the property of the county, a mere *quasi* corporation for governmental purposes, in which natural persons and private corporations have ceased to have any interest as to property, right or title. The court believes that any legislation with reference to the county is purely a matter for legislative discretion as far as these sections of the Constitution are concerned, and though such discretion may involve an unreasonable or arbitrary discrimination against individuals or a certain class of private corporations, such objections would not be fatal upon a constitutional question. Such discriminations should be a matter addressed to the discretion of the legislative body enacting the law.

Numerous decisions have been made, clearly showing the plenary power that the Legislature may exercise in reference to county affairs, county property and county funds. A county, being created by legislative enactment, has only such powers and authority as may be conferred by the Legislature. The Legislature, having power to create, it likewise has the power to dissolve, and the officers of the county, in the administration of their political duties, are guided solely by legislative provisions. This is particularly true as to the collection, custody and disbursement of the public funds. Moreover, it is the well known duty of trial courts, in case of doubt, to sustain and support all legislative enactments, especially where they are in harmony with the best public interest and general welfare.

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As to Section 26, Constitution of Ohio, requiring a statute of a general nature to have uniform operation throughout the state, the court finds that there is such uniformity of operation wherever there are like conditions, and that such section is, therefore, not in any wise violated.

As to the Fourteenth Amendment to the Constitution of the United States, the court finds that this amendment is in no way infringed upon, the same reasoning applying as that under Sections 1 and 2 of Article I of the Constitution of Ohio.

The second question is: Is the Cleveland Trust Company, with its principal office and place of banking business located at No. 1 Euclid avenue, Cleveland, Cuyahoga county, Ohio, under the terms, provisions and spirit of the statute in question "situated" in Summit county, Ohio, by virtue of its having a branch office or bank engaged in a general banking business at Hudson Village, Summit county, Ohio.

The language of Section 1 in question is as follows:

"In each county the commissioners thereof shall designate in the manner hereinafter provided, a bank or banks or trust companies situated in such county, and duly incorporated under the laws of this state, or organized under the laws of the United States as a depository or depositories of the money of the county, provided that in any county where no such bank or trust company exist, or where such bank or banks neglect to bid as provided for herein, or to comply with all the conditions of this act, the commissioners shall designate any other bank or banks incorporated under the laws of this state or organized under the laws of the United States, located and doing business in this state," etc.

Clearly the Legislature intended by this provision to give the home banks of the county the preference in bidding and in being awarded the county funds. These funds have been taken out of the arteries of the county's trade and business, and it was doubtless thought wise by the Legislature that the depository should be established in some bank situated in the county, so that these funds might return to these channels of trade and business, for use and service until they should be needed for disbursement for public purposes, and, therefore, it was provided that the depository should be situated within the county.

The charter of the Cleveland Trust Company designates No. 1 Euclid avenue, Cleveland, Cuyahoga county, Ohio, as its principal place of business. It appears that said trust company has a large number of branch banks, so-called, doing a general banking business situated in various counties adjoining Cuyahoga, one of which is located at Hudson Village, in Summit county, Ohio. The undisputed evidence shows that said bank at Hudson Village has the usual complement of bank officers and employes such as you would expect to find in a small village of about a thousand inhabitants, and that the deposits in cash kept on hand for daily business are about nine or ten thousand dollars. Hudson Village is located some twelve or thirteen miles from Akron, the county seat of Summit county. Under the proposed award to the Cleveland Trust Company, it would receive \$400,000 of the funds of Summit county. The evidence further shows that all excess moneys above nine or ten thousand dollars deposited and received at the bank at Hudson Village are reported and forwarded to the Cleveland Trust Company, at Cleveland, or to such other points as the Cleveland office might order and direct. Outside of the usual and ordinary clerical work by the employes at Hudson Village, the administrative and executive work of such bank is conducted at its principal place in Cleveland, which is in daily communication with the Hudson branch.

The diligence of counsel on both sides of this case has failed to find but one case which throws any light upon this question. That case is entitled *The Fremont Butter & Egg Co. v. Snyder et al*, 39 Neb., 632 (68 N. W., 149). The facts of that case are substantially as follows: The plaintiff was a corporation organized under the laws of Nebraska for the purpose of buying and selling butter and eggs. Its principal place of business, as fixed by its charter, was in Dodge county, and its chief officer resided there. It had and maintained in Saunders county, a place of business, there exercised its corporate functions and had there employes conducting the business for which it was organized. It was there held that the corporation was situated in Saunders county, and, therefore, under the statute of civil procedure of Nebraska, was suable in Saunders county. In the opinion of the court, it is said that a corporation is situated where

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it has and maintains a place of business and servants, employees or agents engaged in conducting and carrying on the business for which it exists.

A very careful search among the reports of our various courts in Ohio has disclosed one case, which throws much light on this question, viz., *The City of Fostoria v. Fox*, 60 O. S., 340. In that case the following facts appear:

The city of Fostoria is located on the county line between Seneca county and Hancock county, a part of the city being located in each county, but with its principal place of business and all of its offices situated within Seneca county. Suit was brought in Hancock county by Fox against the city for mandatory injunction, requiring it to remove a dam from a stream of water, a branch of Portage river, the dam being a part of its system of works for supplying water to itself and its citizens; and for damages on the ground that the lands of the plaintiff were thereby wrongfully overflowed and injured. The dam was on the premises owned by the city, but a short distance below the lands of the plaintiff, situated on the stream above. Fox resided in Hancock county, and the property and the dam causing the injuries complained of were located in Hancock county; the summons, however, was issued by the clerk of the court of common pleas of Hancock county, and was served by the sheriff of Seneca county.

The defendant appeared for the purpose only of objecting to the jurisdiction of the court, and moved to quash the summons and set aside the service of summons made upon it, on the ground that Fostoria was a city situated within Seneca county. The trial court overruled the motion and held that it had jurisdiction of the person of the defendant on the service as made. The defendant excepted. Issues were then made up, trial had and judgment entered against the city. It appealed to the circuit court. The same objection was there made to the court's jurisdiction; the objection was overruled, and exception taken and trial had, which resulted in judgment against the city. Error was prosecuted on various assignments to the Supreme Court especially the error that the court erred in overruling its motion to quash the summons and set aside the service made upon it.

The court, in considering Section 5028, Revised Statutes, (now Section 5023), to-wit, "An action other than one of those mentioned in the first four sections of this chapter against a corporation created under the laws of this state, may be brought in the county in which such corporation is situated, or has, or had, its principal office or place of business, or in which any corporation has an office or agent," proceeds to discuss the meaning and scope of the word "situated" in the following portion of the opinion of Judge Minshall:

"But it is also claimed, that where a city is partly within one and partly within another county, it has a situs in each. This we think is not admissible. If this were so, it would be two cities instead of one. It would be quite as consistent with reason to say, that an individual could have two domiciles. The situs of a city is to be determined by the place where its principal seat of municipal government is located."

If the municipal corporation, the city of Fostoria, has but one situs, which is determined by the place where its principal seat of municipal government is located, it would seem under this opinion of the Supreme Court of Ohio, by parity of reason, that a private corporation can likewise have but one situs, and that where its principal seat of corporate government and business administration is located, and there is no contention here but that that place is at No. 1 Euclid avenue, Cleveland, Cuyahoga county, Ohio.

Taking this decision of our own Supreme Court, Cleveland, Cuyahoga county, is its situs for taxation, is its situs for executive management and business administration, it is the situs where its directors meet, where its loans and discounts are determined upon; in short, it is the seat of government. The incorporated bank is not at Hudson—it is in Cleveland; Hudson is only a feeder, a tributary of the main reservoir in Cleveland. The purposes of the act are doubtless, first, to provide a safe place for the funds; second, to prevent a brokering of the funds; third, to keep the money within the county for the use and benefit of its citizens until it shall be needed for the purposes of public disbursement.

The court holds that under all the circumstances of this case, especially the last purpose just set forth, the Cleveland Trust

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Company is not such a banking corporation as is situated in this county within the meaning of this act. Upon the second question, therefore, the court finds the issues with the relator, and the temporary restraining order heretofore granted is made perpetual, and the costs of the action are assessed against the defendants.

Slabaugh & Seiberling, for plaintiff.

H. M. Hagelbarger and Kline, Tolles & Goff, for defendants.

MUNICIPAL FRONTAGE ON STREET RAILWAY ROUTES.

[Common Pleas Court of Cuyahoga County.]

TAYLOR EMERSON V. THE FOREST CITY RAILWAY COMPANY ET AL.*

Decided, October 26, 1906.

Consents—Of Abutting Owners to the Building of a Street Railway—Municipality as an Abutting Owner—Jurisdiction of Council—Section 2502—Contemporaneous Construction and Acquiescence Therein—Limitation of General Public in Control of Street.

The consent of a municipality, legally granted, to the construction of a street railway along a street upon which the municipality is an abutting owner, may be counted in ascertaining whether a majority of the frontage has consented to the granting of the franchise.

BEACOM, J.

The facts are not in dispute between the parties hereto. The plaintiff, Emerson, is the owner of a parcel of land abutting on Brownell street, in the city of Cleveland, between Euclid and Central avenues. On September 24th, the council of Cleveland passed an ordinance granting defendant, the Forest City Railway Company, the right to construct and operate a street railroad in Brownell street, between Euclid and Central avenues. Said ordinance was lawfully approved by the mayor and published and accepted by the grantee. The defendant, the Municipal

*Affirmed by the Circuit Court, 8 C. C.—N. S., 560.

Traction Company, has acquired by lease all the rights of the Forest City Company under said ordinance.

There abuts upon said street between the points named a cemetery, the Erie Street Cemetery, the property of the city of Cleveland, with a frontage of 363 feet. The written consent of the city of Cleveland as a property holder of abutting property was obtained previous to the granting of the ordinance. If this city property frontage be counted as consenting, then a majority of the property holders abutting on the street had consented to the granting of this franchise. If it be not counted the granting ordinance is invalid.

The issue, then, between the parties hereto is one of law. Section 2502, Revised Statutes, requires that previous to the granting of a franchise to construct a street railway "the written consent must be obtained of a majority of the property holders upon each street on the line of the proposed street railroad represented by the feet front of the property abutting upon the several streets along which said road is proposed to be constructed." The obtaining of such consents is jurisdictional, and the council has no power to grant a franchise until such consents have been so obtained.

Plaintiff says that the 363 feet belonging to the city of Cleveland should not be counted as consenting; that the statute was intended to protect private property owners from oppression by the city council; that the city was not contemplated as one of the property-holders whose consent could be counted; that the council have no jurisdiction of the subject-matter until a majority of the frontage has consented; that in this case, if jurisdiction was acquired by the council at all, it was acquired from itself and not from abutting property owners. This, then, is the only question that the court is called upon to decide: Should the property belonging to the city of Cleveland be counted as part of the consenting frontage?

1. I have already referred to the language of the statute. It requires the consent of a majority of the property holders represented by the feet front of abutting property. The language is simple and unequivocal and in its terms appears to include all property holders upon each street or part thereof. The lan-

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guage seems clear that when the consent of a majority in frontage has been obtained the council has power to grant a franchise—has jurisdiction.

2. In the second place, it is undisputed that such has been the construction placed upon the statute ever since its enactment, that such frontage should be counted, and it is a rule of law, as stated by Chancellor Kent, that “in the construction of statutes the construction which members of the legal profession put upon them is deemed of some importance.” Not only has the legal profession by its acquiescence put this construction upon it, but such has been the construction put upon it by all persons called upon in any way to apply the provisions of that section, and it is said, in 12 Wheaton, 210, that “The contemporaneous construction of those called upon to act under a law and appointed to carry its provisions into effect is entitled to great respect.” Counsel for plaintiff are, of course, right, that the question has never been directly raised or passed upon by a court, and that acquiescence does not amount to a decision of the question, because the question has never been heretofore directly raised. But counsel for defendant are equally right, that the fact that no person has ever apparently raised this question heretofore does carry with it some weight, much weight, in favor of the defendants.

3. Passing now from the express language of the statute and from the fact of acquiescence in a construction adverse to plaintiff's claim, let us consider the question on principle. The council of a municipality is given by the Legislature control over city highways. Without this statute, Section 2502, the council might grant a franchise to construct a street railway in a street without the consent of an abutting property owner, but in order to protect the abutting owner from oppression by public authorities the Legislature has required that before the council can acquire jurisdiction to grant a franchise a majority of the abutting property holders must assent thereto. This is limiting the general public in its control over the highways and is placing a veto power in the abutting property owners. I do not think the statute giving that power to the individual owner along a highway should be liberally construed in favor of the individual owner

and strictly construed against the power of the public speaking through its public officers. If the contention of plaintiff be true, we might find in some cases, where the city owns large frontages, that a small number of persons with a limited frontage would be able to prevent the construction of street railways over long routes. The city might own parks and cemeteries and public grounds on one or both sides of a route, and a small number of abutting owners representing a small frontage might control the building of a street railway in a long public highway. I am not of opinion that the Legislature ever intended to make a grant to abutting owners which could by any possibility work out such results. I am of opinion that all that can be claimed under this statute is that the consent of the majority of property holders, that is, of all property holders, must be had; that when a consent is obtained from property holders owning a majority of the abutting frontage, whether the municipality be one of the consenting abutting owners or not, the council does have jurisdiction to act.

This seems clear to me for the three reasons given. I do not hesitate to refuse this injunction and dismiss the petition. Plaintiff excepts.

Squire, Sanders & Dempsey, for plaintiff.

Garfield, Howe & Westenhaver, for defendant.

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**ABUSE OF CORPORATE POWER AS TO OCCUPATION
OF STREETS.**

[Superior Court of Cincinnati, General Term.]

LOUISVILLE & NASHVILLE RAILROAD ET AL V. THE CITY OF CINCINNATI. *

Decided, October 20, 1906.

Municipal Corporations—Overhead Railway Structure in Streets and Across a Public Landing—Council without Power to Authorize such Occupation, When—Irreparable Injury to the Public—Section 3337-1 Inapplicable.

1. A municipal council is without power, under existing laws, to authorize a railroad company to occupy a street or public landing with an overhead structure, resting upon fixed permanent supports of the character shown in this case and necessarily involving the exclusive use of the grounds so occupied, and an ordinance granting the right to erect such a structure is void.
2. While from the purposes of its creation and dedication, a public landing includes the free and unobstructed passage of travelers and vehicles, its function is much broader and more important than that of a mere street, and considerations which would forbid the occupation of a street by a railway structure are of commanding application in the case of such a landing.

HOSEA, J.; FERRIS, J., concurs; MURPHY, J., concurs in the judgment.

This proceeding is brought to review and reverse the judgment and order of the trial court at special term, denying a motion to dissolve a temporary restraining order theretofore granted, to prevent the Louisville & Nashville Railroad Company and the American Bridge Company from constructing a railway viaduct across the grounds known as the "public landing" in the city of Cincinnati. All the questions presented in argument upon the hearing in this court, were presented to the consideration of the court below, and are fully discussed upon the authorities in the opinion delivered by that court and reported in *Ohio Law Reporter*, Volume 4, No. 15; N. P.—N. S., 217.

*Affirming *Cincinnati v. L. & N. R. R. Co.*, 4 N. P.—N. S., 217.

We have given all these questions and the arguments of counsel in relation to the same our careful consideration, and the conclusions reached by us are in accord with the views and findings of the court below. We think that the city council was without power, under existing laws, to authorize a railroad company to occupy the public landing with a structure of the character shown in this case, resting upon fixed permanent supports, which necessarily involves an exclusive use of the grounds so occupied, and that consequently the ordinance is void.

While the reasons and citations of authority given by the court below in its published opinion are so full and satisfactory, as to render a further statement of them unnecessary here, there are additional reasons for the finding that may with propriety be mentioned, based upon facts of which judicial notice may be taken, in so far as they are not specifically included in the record.

The "public landing" is a portion of the river bank, graded to a substantially uniform slope from the first "bench" down to low water line of the Ohio river. This tract extends from east to west along the river, approximately one thousand feet, east to west along the river, approximately one thousand feet, of Front street, distances varying according to the stages of water in the river, being considerably greater at the west side at the projected line of Main street than at the east side at the projected line of Broadway, but an average at extreme low water of, say, seven hundred and fifty feet. This tract was set apart and dedicated by the founders of Cincinnati as a "public landing," and is the sole public wharf or landing-place of this character possessed by or available to the city, and has been in public use for this purpose from a period beyond the memory of those now living.

The special purpose of its dedication was and is, to afford, by means of its long slope, a safe and convenient landing place for freight and passenger boats at all stages of the river, from extreme low to extreme high water, where at all times (excepting during unusual floods completely submerging it) boats

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may land and receive and discharge their cargoes with convenience and safety. An important part of its general function also, is to afford opportunity for wagons to approach the water's edge from the business portions of the city, bringing goods to the boats for shipment and hauling away the discharged cargoes—the slope affording an opportunity for teams to attain easy grades for heavy loads by selecting at will, paths of travel to and fro, at any desired angle to the line of the slope. It is, therefore, properly speaking, not a "street." While the purposes of its creation and dedication include the free and unobstructed passage of travelers and vehicles, its function in this respect is much broader and more important than that of a mere street, by reason of its connection with the landing of boats, the handling of cargoes, and the consequent necessity of entire freedom in selecting paths of travel for haulage at any angle with the slope. In a general sense, the function of the public landing as a place for unloading cargoes is analagous to that of automatic landing-stages which rise and fall with the tide. The Ohio river is subject to frequent changes of elevation, which recur with more or less regularity within wide limits, and for which the slope of the landing affords ample provision. As the river rises, the boats land nearer the upper limit of the slope, but that portion which remains above water still retains *pro tanto* all the functions of the whole.

It is apparent that a fixed structure such as a railway viaduct resting upon a line of piers or abutments extending from east to west upon the slope of the public landing, parallel with the river, while at low stages of the water it might be simply an inconvenience to the public use of the landing, would be absolutely prohibitive of such use whenever the water reached the vicinity of the line of abutments, and at all stages beyond. If teams were compelled to pass between piers or under archways to reach boats, there must be room enough below to turn and get into position to load and ascend the slope again, and this could not be done when the water approached near to the line of the viaduct; and, certainly, interchange of freight between wagons and boats would not be possible at all at higher stages of the water. At

such times the entire upper part of the slope would be entirely cut off by such a structure as that in question, from its intended use. It is thus clearly apparent that the extent of the destruction of public rights in the premises is not to be measured by the mere spaces occupied by piers, but is co-extensive with the existence of the proposed structure as a whole, which under frequently recurring conditions would effectually destroy the entire use of the public landing as such.

These facts and the great detriment to the public interest that would inevitably ensue from the proposed construction of the railway viaduct, and especially in view of the improvements in the navigation of the Ohio river now under way and the stimulus to the shipping interests of Cincinnati so generally expected to arise therefrom, may well be set off against the argument so strenuously urged in this court based upon the large expenditure made and to be made by the railroad company in the construction of the viaduct, and the loss to ensue to them in case of its completion be not permitted. The exclusive occupancy of a street in a city is usually at most an inconvenience merely, because other streets supply the means of travel between the same points. In this case, however, the destruction of the public landing for its intended use would inflict a loss upon the city that would be very great and would also be irreparable, for there is no available substitute.

These facts and considerations also suggest the entire inapplicability of Section 3337-1, Revised Statutes, as amended April 21, 1904, to the case in hand, as vesting in the city council authority to pass the ordinance in question. That section has exclusive reference, in terms, to the crossing of streets, and it is clearly apparent from its reading that the law-makers had in view a bridge crossing ordinary streets from side to side, and that only. By no reasonable or possible construction can it be held to intend or include a public landing of this character which obviously is not a street in any such sense as contemplated by the statute in question. But even if this were not so and a power exists by virtue of the statute authorizing councils to agree with railroad companies as to the manner of occu-

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pation of streets, still, such power must be taken with the limitation existing in the fundamental law originating in the purposes of the dedication to public uses and formulated in the code provision requiring councils to keep such property free from nuisance. To hold otherwise would give to the statute from which the power is claimed to arise in this case by implication, the effect of repealing, by the same implication, the prior and explicit statute declaring the fundamental law. This we can not do. Even if it could be done, we would be relegated at last to the question of abuse of the discretionary power thus vested, and we would still be compelled, upon the facts of this case, to hold the grant void as a palpable abuse of discretion. The question whether or not a structure in public streets is or is not a nuisance, is, and must always be, a judicial question, and no action of the Legislature can oust the courts of their power of determination in this regard, by giving authority to council. We are, therefore, of opinion that, for the reasons here stated, in addition to those pointed out in the opinion of the court below, the judgment denying the motion to dissolve the injunction was correct and should be affirmed, and it is so ordered.

Judgment affirmed.

MURPHY, J.

I concur in the judgment of affirmance of the judgment of the court below. The reason assigned in the above opinion, beginning at the last paragraph on page 2 [of the written opinion] was not before the court and therefore I pass no opinion thereon.

Kinkead, Rogers & Ellis, for plaintiffs in error.

Jesse Lowman, City Solicitor, and *Walter A. DeCamp*, Assistant City Solicitor, for defendant in error.

TESTIMONY OF COMMON LAW WIFE AGAINST HUSBAND ON TRIAL FOR BIGAMY.

[Comon Pleas Court of Allen County.]

THE STATE OF OHIO V. DAVID F. BATES.

Decided, November 3, 1906.

Criminal Law—Husband on Trial for Bigamy—Testimony of Common Law Wife Incompetent—Testimony Establishing a Common Law Marriage.

1. The common law rule forbidding a husband or wife from testifying against each other has not been modified in Ohio to the extent of permitting a first wife from testifying against her husband who has married another woman and is on trial for bigamy.
2. The refusal of the trial judge to permit the first wife to testify in such a trial, on the ground that her testimony is incompetent on account of her relationship to the defendant, will not be regarded as prejudicial to the defendant, where accompanied by an explicit statement by the court to the jury that no fact with reference to the first marriage is thereby determined by the court.
3. Where a man and woman agree together that they will take each other for husband and wife, by words in the present tense, and that they will thenceforth occupy the relation of husband and wife during their joint lives, and this agreement is followed by cohabitation as husband and wife, and the woman is introduced by the husband as his wife, and the man is subsequently married in the usual form to another woman, there is a sufficient predicate for a conviction of bigamy in this state.

MATHERS, J.

This is on a motion for a new trial. There are numerous grounds urged, none of which, in the judgment of this court, are, well taken and only two of which are important enough to call for comment. One ground is the alleged misconduct of the prosecutor in calling the alleged first wife of the defendant as a witness and his subsequent reference to the ruling of the court upon the defendant's objection as to her competency. The court sustained the objection and excluded the witness.

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Some reference to this ruling of the court was made by the prosecutor in his argument to the jury, as sustaining the state's contention that the woman was the defendant's wife. The court, however, was explicit and particular in its instructions to the jury, at the time the statement was made, that the jury must not think or conclude that the court had determined any fact in the case, and particularly the relationship of the alleged first wife. The jury were instructed that that was one of the principal issues in the case, and that whether or not she was the defendant's wife was to be determined by them from the evidence regardless of anything the court might have ruled in this behalf. They were further instructed that the court had no authority to determine any fact in issue, but that that was a matter solely within the province of the jury and that they could not lawfully conclude, from any ruling the court had made, as to whether this woman was the defendant's wife or not. The court is now of the opinion that in the face of this instruction, which was given with great care and promptness, that the defendant was not prejudiced.

The main contention of the defendant on this motion, however, is that the evidence fails to show that there was any lawful or valid marriage between the defendant and the alleged first wife; that she and the defendant were merely living together in a state of fornication; that she was not his lawful wife; that, in short, as Section 7020, Revised Statutes, inhibits persons of the opposite sex from living together in a state of adultery or fornication, it was manifestly the intention of the Legislature to penalize any such cohabitation, unless a marriage, under a license, or after the publication of banns, was solemnized by a magistrate, clergyman or priest. In other words, that a common law marriage can not serve as a predicate for a conviction of bigamy in this state. This question was fully argued during the progress of the trial, and the court held that a common law marriage could be made the basis of a bigamy prosecution, reaching that conclusion not only upon reason, but upon the authority of several decisions in this state where, in several cases, such a marriage has been recognized, and particularly in

the criminal cases of *Carmichael v. The State*, 12 O. S., 553, and *Swartz v. The State*, 13 Circuit Court Reports. The Swartz case was a bigamy case. The accused had lived with a woman for a number of years and had had two children by her, whose legitimacy was not only recognized by their jointly naming one of the children for him, but in all the other ways that a man might recognize his children as legitimate. The defendant in that case, and the woman, held each other out to the world as husband and wife; were recognized as such in society and in the church which they attended. The defendant abandoned this woman and married another under the forms of the statute. He was convicted of bigamy and the circuit court held the conviction rightful.

In the case at bar, Bates and Miss Ginter lived together from December 17, 1904, until sometime in July, 1906. They occupied the same room in his mother's house part of the time. He introduced her to a number of people as his wife, and said to others that she was his wife; he took her to a furniture store where they looked at some furniture and ordered some for some rooms that they intended to occupy, and he introduced her to the dealer as his wife. From the language of a number of letters which he wrote to her, and which were in evidence, the conclusion might reasonably be drawn, not only that they occupied the marital relation toward one another, but that an agreement to live as husband and wife existed between them. Furthermore, she had a child by him which was delivered at the home of his mother, and he procured the services of a firm of physicians for the occasion, telling them at the time he desired them to attend his wife in confinement.

On September 23, 1906, after procuring a marriage license a few days before, he was married to a Miss Miller by a minister of the gospel. The jury were carefully and fully instructed that if they were satisfied beyond a reasonable doubt that the defendant and Miss Ginter agreed with each other that they would take each other for husband and wife, by words in the present tense, and would thenceforth occupy the relation of husband and wife during their joint lives, and this agreement

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was followed by cohabitation as husband and wife, they might find the defendant was legally married. They were instructed that they must look at all the evidence which had been admitted for their consideration; at the conduct of the parties in respect to this alleged contract; to any statements or admissions which might have been shown to have been made by the defendant, and, in the light of this evidence, in view of the circumstances as disclosed by the evidence, they should exercise their independent judgment and determine whether or not this contract of marriage had been entered into. Presumably the jury were satisfied beyond a reasonable doubt that such a contract existed; and, there being no dispute as to the second marriage of the defendant, the jury found the defendant guilty.

This court believes it to be the law that if a man and a woman agree together, by words *in præsenti* to become husband and wife, they being competent to make such a contract, and this agreement is followed by cohabitation, that they are as effectually married as if a ceremony had been performed in the presence of witnesses, after a license had been obtained or banns published. And that if thereafter the parties cohabit as husband and wife and hold themselves out as such, and if the man admits he is married to the woman and treats her as his wife, and especially if he have a child by her, that every consideration of law and good morals would require that he should be punished for bigamy if he afterward marry another woman. The statutes prescribing the forms for obtaining a license or the publication of banns and the solemnization of the marriage contract, are simply a regulation of the natural right of a man and a woman to marry. The statutes do not create that right; neither do they prohibit what is called a common law marriage, and while the court does not mean to stamp its approval upon clandestine and secret agreements, nor to say that common law marriages are to be encouraged, yet, until the Legislature expressly prohibits them, the court is of the opinion that they do serve as a predicate for a conviction of bigamy if one of the parties to such a marriage afterward marry another.

It was said by one of Ohio's most learned jurists, in a case which the Supreme Court of this state decided, that the common

law was a part of the law of Ohio, except where it was inconsistent with the genius of our institutions, or where it had been expressly or impliedly abrogated by statute or a decision of the court.

Counsel for the defendant relied upon the existence in this state of the common law when they objected to the testimony of the defendant's alleged first wife. The statute in this state, defining the competency of witnesses in some cases, provides that husband and wife may testify in behalf of each other in criminal trials. To that extent only is the common law rule of evidence modified in this state. The common law rule did not permit husband or wife to testify either for or against each other, the theory of the common law being that the personality of the wife was merged in that of the husband. This led to many injustices and the Legislature finally modified it to the extent indicated. But the modification did not abrogate the rule in so far as it prohibited the testimony of husband or wife against each other; and so the court excluded the testimony of the defendant's alleged first wife. This is cited merely as an illustration of the fact that the common law rules are still in force in this state where they have not been abrogated. The reasons for upholding a common law marriage in a prosecution for bigamy, are just as imperative and as well grounded in considerations of public policy, as for upholding any other kind of a marriage, and doubtless, if a man and woman had so conducted themselves as to come within the rule of a common law marriage, considerations of public policy would forbid their denying that relationship afterwards. I fail to perceive any good reason why, after such a marriage has been entered into, a prostitution of the marriage ceremony, which is involved in a second marriage while a common law wife is alive, is not just as much bigamy as if the first marriage had been solemnized by a magistrate, minister or priest. A bigamous marriage *ex vi termini* means one where one of the parties already has a husband or wife living; and where a man has, to all intents and purposes, married a woman and lived with her as his wife and introduced her as such and had a child by her, I think he is as fully married as if a ceremony had been performed.

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The motion for a new trial will be overruled.

B. F. Welty, Prosecuting Attorney, for state.

A. D. Graham and *Wm. Klinger*, for defendant.

DESTRUCTION OF UNWHOLESOME MILK LEGAL.

[Common Pleas Court of Hamilton County.]

BENJAMIN KAISER V. EDWARD WALSH, ASSISTANT MILK INSPECTOR OF THE CITY OF CINCINNATI.

Decided, November 24, 1906.

Board of Health—Powers of, With Reference to Destruction of Unwholesome Milk—Ordinance Regulating Temperature of Milk on Sale Legal—Nuisances—Things Which are Such by Nature, and Which are Made Such by Manner of Use—Taking Property Without Due Process of Law.

1. A resolution of a board of health providing that "all milk, the temperature of which shall be found on examination or test to be above fifty degrees Fahrenheit, shall be confiscated, forfeited, and immediately destroyed by or under the direction of a health officer or milk inspector," is not unconstitutional.
2. There are some things which are public nuisances by nature. Such are things which are harmful to the public health, as unwholesome food. An ordinance providing for the immediate destruction of such a nuisance by an official is not in contravention of that constitutional guaranty which provides that no man's property may be taken without due process of law. When the thing itself is not a nuisance, as a house or animal, for instance, but the way in which it is used is a nuisance, then the thing can not be destroyed; its illegal use must be punished.

LITTLEFORD, J.

The petition states that Kaiser, the plaintiff, sells milk in Cincinnati and that Walsh, the defendant, is the milk inspector, and that the defendant, Edward Walsh, the milk inspector of the city of Cincinnati, on the 24th day of August, 1906, got upon one of plaintiff's milk wagons, and, after inserting a ther-

momometer into a can of milk to ascertain its temperature, threw the milk into the street.

The petition further says that the defendant, Edward Walsh, threatens to, and will, unless restrained by this court, again board some one of plaintiff's milk wagons, to test the temperature of the milk, and if he finds on test that the milk is above fifty degrees Fahrenheit, he will again destroy the milk.

The petition further says that the defendant is acting under a resolution of the Board of Health of the City of Cincinnati, adopted July 17, 1906, a copy of which is set forth, and one clause of which reads:

"All milk, the temperature of which shall be found on examination or test, to be above fifty degrees Fahrenheit, shall be confiscated, forfeited, and immediately destroyed, by, or under the direction of, the health officer or milk inspector."

Plaintiff further alleges in his petition that this resolution is unconstitutional, null and void and of no effect, and is in contravention of Article I, Sections 1, 5, 10, 14, 16 and 19, of the Bill of Rights, and Article IV, Section 1, of the Constitution of the State of Ohio, and Articles IV, V, VI, and XIV, in addition to, and amendment of, the Constitution of the United States of America. On the ground that this resolution is unconstitutional, plaintiff prays that the defendant be restrained from continuing to do the acts complained of.

The constitutional provisions which are referred to are as follows: Article I, Section 1, guarantees the right to possess and protect property; Section 5 provides that the right of trial by jury shall be inviolate; Section 10 provides that no person shall be held to answer for crime unless on presentment or indictment of a grand jury, and to have a speedy trial by an impartial jury; Section 14 guarantees the right of the people against unreasonable searches and seizures; Section 16 insures to every person, for an injury done him in his lands, goods, person or reputation, remedy by due course of law; and Section 19 is to the effect that private property shall not be taken for public use until compensation therefor shall first be made in money. Article IV, Section 1, of the Constitution

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of the State of Ohio, provides that judicial power shall be vested in certain courts, naming them.

Articles, IV, V, VI, VI and XIV in addition to, and amendment of, the Constitution of the United States of America, are as follows: Article IV forbids unreasonable searches and seizures; Article V provides that no person shall be held to answer for crime except upon presentment or in lietment by a grand jury, nor shall he be deprived of life, liberty or property without due process of law; Article VI provides for public trial by an impartial jury, and Article XIV provides that no state shall deprive any person of life, liberty or property without due process of law.

It will be seen that these constitutional sections frequently overlap each other. To sum up these numerous provisions upon which the plaintiff relies, it may be said that they amount to this: That no man shall be deprived of his property without *due process of law*.

It should be said here that the resolution of the board of health has the same effect as an ordinance, by virtue of Section 1536-731, Revised Statutes.

In support of his contention, the learned counsel for plaintiff cites the following cases:

Rosebaugh v. Saffin, Marshal of Cincinnati, 10 Ohio, 31, holds that an ordinance providing for the sale of straying hogs, after keeping them three days and advertising the same, is unconstitutional.

Fagin v. The Ohio Humane Society, 6 N. P., 357, holds that a statute authorizing the humane society to dispose of unlicensed dogs is unconstitutional.

Yensen v. The State of Ohio, 7 N. P., 18, holds that a statute giving authority to any person to destroy fish nets which are being used in violation of law, is unconstitutional; and the same holding with refernce to fish nets is made in *French v. Shirley*, 7 N. P., 26.

Archer v. Baertschi, 8 C. C., 12, holds that an ordinance of the city of Toledo providing for the sale of dogs found running at large without license checks, is unconstitutional.

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Edson et al v. Crangle et al, 62 O. S., 49, holds that a statute authorizing the seizure of a fish net which is being illegally used, is unconstitutional.

King v. Hayes, 80 Me., 206, holds that a statute authorizing an officer of a humane society to condemn and kill a horse that is of no value to the owner, is unconstitutional.

As against this array of cases, the learned counsel for the defendant cites two well-considered cases which hold that an ordinance providing for the destruction of milk, just like that under consideration, is not contrary to any constitutional provision. These two cases are the following:

Blazier et al v. Miller, 10 Hun., 435, holds that an ordinance of the board of health of the city of Syracuse, authorizing the milk inspector to destroy milk, which he has reasonable cause to believe is below the standard, is a valid ordinance.

Deems v. Mayor and City of Baltimore, 80 Md., 164, holds that the constitutional guaranties concerning property and liberty are not to be construed as abridging the power of the state to pass a law authorizing an official to destroy milk found to be below the legal standard.

In addition to these cases, the following authorities are cited for the defendant:

"It is fairly established by adjudications too numerous to mention that a state may in the exercise of its police power authorize the destruction of such property as has become a public nuisance or has an unlawful existence or is noxious to the public health." *Houston v. State*, 98 Wis., 481, 486.

"The acknowledged police power of a state extends even to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed. Merchandise from a port where a contagious disease prevails, being liable to communicate the disease, may be excluded; and in extreme cases, it may be thrown into sea. * * * It is a power essential to self-preservation and exists necessarily in every organized community." *License Cases*, 5 How., 504, 589.

"An act which * * * makes animals with contagious diseases or infectious diseases, common nuisances, authorizing their destruction by certain officials under certain conditions" is not unconstitutional. *Newark Ry. Co. v. Hunt et al*, 50 N. J. L., 308.

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"It can not be denied that in many cases a nuisance can only be abated by the destruction of the property in which it consists. The cases of infected cargo or clothing and of impure and unwholesome food are plainly of this description. They are nuisances *per se*, and their abatement is their destruction. So, also, there can be little doubt, as we conceive, that obscene books or pictures, or implements only capable of an illegal use, may be destroyed as a part of the process of abating the nuisance they create, if so directed by statute. The keeping of a bawdy house, or a house for the resort of lewd and dissolute people, is a nuisance at common law. But the tearing down of the building so kept, would not be justified as the exercise of the power of summary abatement, and it would add nothing, we think, to the justification that a statute was produced authorizing the destruction of the building summarily as a part of the remedy. The nuisance consists in the case supposed in the conduct of the owner or occupants of the house, in using or allowing it to be used for the immoral purpose, and the remedy would be to stop the use. This would be the only mode of abatement in such case known to the common law, and the destruction of the building for this purpose would have no sanction in common law or precedent." *Lawton et al v. Steele*, 119 N. Y., 226, 238.

A well-considered case in Ohio is *Deming v. City of Cleveland*, 22 C. C., 1. It was a case in which a stream of water, running through plaintiff's land, was diverted from its course by the council of the city of Cleveland and turned into an artificial water-course above the plaintiff's premises. It appears that the banks of the stream were so covered with rubbish and filth as to make the stream a nuisance. The court held that the act of the Legislature conferring power on the city of Cleveland to divert this stream was unconstitutional and void. In the long and well-considered opinion, the learned court evidently recognizes the principle that while a statute or an ordinance can not decree the destruction of property because it is used in some improper way so as to be a menace to the public health, just to punish the owner of the property for so using it, still it can decree the destruction of property the very existence of which endangers the health of the public.

The adoption of the provisions of the Constitution of the United States and of the State Constitution, that no man shall

be deprived of his property without "due process of law," did not abolish the principle of the common law that either the king or any of his subjects had the right to summarily abate a public nuisance—for such abatement was due process of law within the meaning of Magna Charta. If a mistake was made, then there was a cause of action.

If a private individual may abate a public nuisance, a duly authorized official, acting under the provisions of a statute or ordinance, can certainly do so.

There are some things which are public nuisances by nature. Such are things which are harmful to the public health, as unwholesome food. An ordinance providing for the immediate destruction of such nuisances by an official is not in contravention of that constitutional guaranty which provides that no man's property may be taken without due process of law. When the thing itself is not a nuisance—as a house or an animal, for instance—but the way in which it is used is a nuisance, then the thing can not be destroyed; its illegal use must be punished.

The demurrer is sustained.

Renner & Renner, for plaintiff.

John R. Schindel, for defendant.

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LIMITATIONS OF BONDING POWER.

[Common Pleas Court of Mercer County.]

J. F. SMITH V. THE VILLAGE OF ROCKFORD ET AL.

Decided, November 17, 1906.

Corporations, Municipal and Village—Authority of, to Issue Bonds—Right of Tax-payer to Enjoin Abuse of—Extends to Property Owner in Village—Street and Sewer Improvements—Application of Sections 53 and 100 of the Municipal Code and of the Longworth Bond Act—Special and General Powers of Council—Power to "Make" and Power to "Pay for" Improvements—Duplication of Powers.

1. The right of a tax-payer to bring an action to enjoin a threatened abuse of corporate power was not created by the municipal code, nor is it restricted to property owners in cities, but when occasion arises is equally available to one owning property in a village.
2. The limitations of Section 100 of the municipal code and Longworth bond act, which is in effect a part of that section, are controlling upon city and village councils in the issue of bonds to pay the corporation's share of street and sewer improvements and intersections, provided for in Section 53 of the municipal code; unless authorized by the electorate, therefore, such issues must be restricted for any one fiscal year to one per cent. of the amount of taxable property within the corporation and on the tax duplicate.

MATHERS, J.

This is an action by a tax-payer of the village of Rockford, seeking, in behalf of the village, to enjoin a threatened alleged abuse of corporate power by the village council, and the carrying out of certain contracts, alleged to be illegal, by some of the defendants who are contractors with the village for the street and sewer improvements hereinafter mentioned.

The right of the plaintiff to sue in this behalf was questioned at the hearing. It was urged that the municipal code only pro-

vides for such actions as this in the case of cities, but makes no such provision where villages are involved. That would be a strange doctrine which would deny to a citizen the equal protection of the laws merely because he happened to live in a village instead of a city. The provision of the code in the case of cities is merely a regulation of a right which a tax-payer has without these provisions. They do not *create* the right to appeal to the courts for the vindication of rights. This right exists independently of those statutes, though, since their passage, the courts would doubtless require applications to be made subject to their requirements. That the plaintiff may maintain this suit is abundantly established both in reason and authority. For the latter, see Pomeroy's Equity Jurisprudence, Section 276 and Section 1345 (2d Ed.); Dillon's Mun. Cpnns. (4th Ed.), Section 914; *Raynolds v. Cleveland*, 13 Dec., 258; *Cincinnati St. Ry. v. Smith*, 29 O. S., 291.

The council of the village of Rockford, in Mercer county, has taken action to improve two certain streets of the village, by grading, paving and draining the same, and to assess the cost thereof, by the front foot, on the lands and lots "bounding and abutting" thereon; and to construct two sewer improvements in the village and to assess the cost and expense thereof, in proportion to benefits, upon the bounding and abutting lots and contiguous territory. It has determined to pay the one-fiftieth of the cost of each improvement, and the cost of intersections, by a levy on all the taxable property of the corporation. It proposes to issue bonds in anticipation of the special assessments referred to, and to issue the bonds of the village to pay its said share of the improvements and the cost of the intersections. It has authorized and sold, and will deliver to the purchasers, unless restrained, \$17,000 of village bonds to raise money to pay the village's share and the cost of intersections aforesaid. The appraised valuation of all taxable property in the village is \$358,320, and one per cent. of this is \$3,583.20. The village owns a water works, extensions of which have been made and contracted involving an expenditure of \$3,900, and bonds in the sum of \$2,000 have been issued in this behalf.

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Plaintiff contends that the proposed action of issuing the \$17,000 in bonds, as aforesaid, is *ultra vires*, inasmuch as it contravenes Section 100 of the municipal code and the act of April 29, 1902, known as the Longworth Bond Act. These provisions of the statutes inhibit the creation, by the council of a municipal corporation, of a bonded indebtedness in any one fiscal year for any or all of the purposes mentioned in the act, in excess of one per cent. of the total value of all property in the corporation listed and assessed for taxation, unless such excess is authorized by a vote of the electorate.

The defendants contend that the proposed issue of bonds is not to be made under Section 100, but by virtue of Section 53 of the municipal code, which provides that "any city or village is hereby authorized to issue and sell its bonds as other bonds are sold to pay the corporation's part of any improvement aforesaid (referring to improvements which are to be paid for by special assessments on abutting or benefited property), and may levy taxes, in addition to all other taxes authorized by law, to pay such bonds and the interest thereon." They contend that the corporation has, by law, two classes of powers, one general and the other special, to make such proposed improvements; that the general powers are enumerated in Section 7 of the code, among which, in subdivision 18, is conferred power to *improve* streets, etc., and in subdivision 19, is conferred power to construct and to keep in repair sewers; and that Section 7 authorizes council to provide, by ordinance or resolution, for the enforcement and exercise of said powers. They contend that these so-called "general powers" authorize council to make street or sewer improvements at the general expense of the corporation, *i. e.*, pay the entire cost and expenses thereof, by general taxation; and that when this plan is adopted, *and then only*, the provisions of Section 100 of the code apply. They contend that the so-called "special powers" of council are conferred in Section 9 of the code, and that in the 5th subdivision thereof is the power to levy and collect special assessments; that the sections of the code relating to special assessments are exclusive, and in themselves are intended to delimit a plan for the construc-

tion of certain improvements, and among them street and sewer, which plan, if adopted by council, is not subject to the provisions of Section 100 and the Longworth Bond Act. Their contention is based on the theory that Section 100 and the Longworth Bond Act constitute a general provision, and that Section 53 is a special one, forming an exception to the general one, and, consequently, outside of and not to be affected by it.

In the second division of the code, under the head of "Powers of Municipalities," are two sub-heads: the first being "General Powers," and the second being "Special Powers." Under the former is found Section 7, and subdivisions 18 and 19, already mentioned; and under the latter is found Section 9 and the 5th subdivision thereof above mentioned. Counsel for defendants, who made the principal argument, seemed to find much significance in this division of powers, contending that Section 100 and the Longworth Bond Act, being a general provision, could only relate to the general power mentioned, and could not affect the special power, which was governed by Section 53, relating to bond issues on account of special assessments.

The infirmity of this reasoning is that counsel confuses the power conferred to secure a certain end, viz., the power to *make* the improvements, with the power conferred to adopt a means to that end, viz., to *pay* for the improvements. It is obvious that whether an improvement is to be paid for by general taxation, or by special assessment; in either case the power to make the improvement at all is basic, and on it must rest the exercise of either plan of payment. So that, even if a so-called "special power" is to be exercised in paying for the improvement, as by a special assessment, yet this power can not be exercised without also exercising the so-called "general power" to authorize or make the improvement. There is, therefore, nothing in the classification of municipal powers into general and special, that serves as a foundation for the contention that Section 53, being in aid of the delegation of the special power to levy and collect special assessments (Section 9, subd. 5), must, for that reason, be an exception to the general provisions of Section 100 and the Longworth Bond Act, which, it is contended, relate only to the exer-

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cise of general powers (Section 7, subd. 18 and 19). If counsel admit at all—and I think one of his premises involves that admission—that Section 100 and the Longworth Bond Act control the action of council in issuing bonds in order to effectuate the exercise of the *general powers* conferred by Section 7 (subd. 18 and 19 of which relate respectively to the making of street and sewer improvements), he admits plaintiff's whole contention. For if the power to authorize or order or make the improvements be a "general power," and it is found in the delegation of so-called general powers (Section 7, subd. 18 and 19), and if the improvements can not be made except by exercising this power—and obviously they can not—then it would seem to follow that that general power can only be exercised in conformity with limitations upon it which are an essential part of it.

By the same reasoning exactly by which counsel concludes that the power to levy and collect special assessments, being a special power, is entirely independent of the general power to make the improvements, it may be said that the power to levy and collect taxes and the power to borrow money are special powers and entirely independent of the general power to make the improvement. The power to levy and collect taxes and the power to borrow money are both designated "special powers" in the code, being found enumerated in the same section as is the power to levy and collect special assessments, and being respectively subdivisions 4 and 6 of Section 9. By Section 32 of the code, being in aid of the delegation of the special power to levy and collect taxes, it is provided that "the council of every municipal corporation shall have power to levy and collect taxes upon all the real and personal property within the corporation for the purpose of paying the expenses of the corporation, constructing all improvements authorized and exercising all the general and special powers conferred by law." This language of Section 32 does not support counsel's contention that special and general powers are mutually exclusive—are like the Jews and Samaritans and can have no dealings with one another. For to take the case put by counsel,

of making an improvement and paying for it by general taxation, before council could effectuate an exercise of the *general* power to make or authorize the improvement (Section 7), it would have to exercise the *special* power (conferred in Section 32) to pay for it. Manifestly it is not the classification of powers, nor is it the character of the power, which determines the applicability of the Longworth Bond Act. The truth is that all the powers interact, when occasion demands, and may be interdependent in order to effect a corporate object.

But aside from the reasoning based on the classification of powers, is there, in the code, ground for the contention that Section 53 is an exception to Section 100 and the Longworth Bond Act? Do Section 100 and the Longworth Bond Act, authorizing, as the latter does, the issue of bonds for street and sewer improvements, prescribe the general rule as to limitations of bonded indebtedness; and does Section 53, authorizing council, as it again does, to issue bonds for street and sewer improvements, prescribe a special rule, which must operate independently of the general one in Section 100 and the Longworth Bond Act? The answer must be in the affirmative, if the two sections or provisions can not be harmonized. Endlich, Interpretation of Statutes, Section 216, lays down the rule:

“If there are two acts, or two provisions of the same act, of which one is special and particular, and clearly includes the matter in controversy, whilst the other is general, and would, if standing alone, include it also, and if reading the general provision side by side with the particular one, the inclusion of that matter in the former would produce a conflict between it and the special provision, it must be taken that the latter was designed as an exception to the general provision.”

The code ought to be considered as a whole. The two sections involved, Sections 53 and 100, are each contained in the code as it was adopted in the act of October 22, 1902 (96 v. 20, *et seq.*), and they remain as integral parts of it. Their provisions must have been within the legislative contemplation when the act was adopted. It is true the Longworth Bond Act is a piece of antecedent legislation, but Section 100, passed at

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the same time as Section 53, does not merely provide it "shall be and remain in full force and effect," but contains a renewal of the legislative intent that municipal corporations, when they issue bonds for purposes mentioned in the act shall be governed by its limitations. It is true the terms of the act are permissive as to the issue of bonds, but it is difficult to imagine how they could be anything else, for the Legislature did not intend to *direct* council to issue bonds for the purposes mentioned.

The present Constitution of Ohio requires the General Assembly, by Section 6 of Article XIII, to restrict municipal corporations in their powers of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such powers. One of the purposes of the Legislature, in enacting the act of October 22, 1902, commonly called the municipal code, was to carry out the constitutional requirement. It so declared itself in the preamble to that act. Where one of two constructions of a section or sections of the code will effect this declared purpose, and the other will not, the former will be adopted.

Starting with these premises, let us examine the meaning and the relation, if any, of the two sections, 53 and 100. Section 53 is primarily concerned with limiting special assessments. It requires, however, that the corporation shall pay at least one-fiftieth of the cost of any improvement which is specially assessed and also the cost of intersections. It then provides that the corporation may issue its bonds to pay its share of the expense of such improvements. The question is, is this power to issue bonds subject to the limitations of the Longworth Bond Act? If it is, then, why, it may pertinently be asked, was the power here in Section 53 specially conferred, when the same power is conferred in the Longworth Bond Act? The only answer which suggests itself, and one which is not as satisfactory as it might be, is that the duplication is the result of the heterogeneous character of the code, which consists of old statutes in connection with new ones. The General Assembly evidently deemed it safer to leave many statutes relating to municipal affairs intact, either because they were generally understood,

or had stood the test of experience or of attack in the courts, than to attempt to cover the same subjects anew. But notwithstanding the duplication of powers in this behalf, there is this consideration to be regarded, namely: Does the construction that Section 53 contains a special grant of power, and therefore, not subject to the limitations of the Longworth Bond Act, produce a result consistent with the declared legislative intention to restrict the power of municipal corporations to borrow money and contract debts? I think not, as will be shown later.

Section 53 is only operative when part of the cost of an improvement is to be specially assessed on abutting or benefited property. The mere fact that part of the cost is thus to be paid does not change the nature of the other part, the part which the corporation is to pay. To pay the corporation's part requires a levy on all the taxable property of the corporation, and bonds issued to pay the corporation's part are payable by general taxation. Such bonds are as essentially a part of the corporation's debts as would be bonds issued to pay the whole cost if it had been assumed by the corporation. The action of council, determining to pay one-fiftieth or any other portion, and to pay for intersections, is not a special assessment, and bonds issued therefor are not bonds which are to be paid by special assessment. Take, for instance, the case at bar. The assessment in the street improvement is by the front foot on the abutting lots and lands. On what lots and lands of the village can it be said that the one-fiftieth of the expense is to be levied by the front foot? Or on what lots and lands of the village can it be said the cost of the intersections is to be levied by the front foot? The levy for the village's share and for the intersections is not *specially assessed* on any lots or lands, but is generally assessed on all the property in the village, subject to taxation, personal as well as real. Neither, in the case of the sewer improvements, is the village's share, or the cost of intersections, a special assessment on the lots and lands of the village. The improvement was to be paid for by special assessment, according to benefits, on the bounding and abutting lots and contiguous territory. Can it be said that the levy to pay the village's share and for the intersections

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is a special assessment on all the lots and lands in the village in proportion to benefits, when there is no apportionment of assessment to special benefits to the lots and lands, and when, in fact, the village's share is assessed generally on not only the real but the personal property in the village subject to taxation? The general levy to pay the village's share and for intersections is radically different from a special assessment by the foot front or in proportion to benefits; it is, in fact, like any other general tax, and the corporation's share referred to in Section 53 and the cost of intersections, is paid by general taxation and not by special assessment.

Counsel's contention, that the village's share and the cost of intersections must be regarded as a special assessment, can not, therefore, be maintained. And this conclusion is supported by the decision in *Comstock v. Incorporated Village of Nelsonville*, 61 O. S., 288, 296, where it is said:

“ * * * the only money which the municipality pays out of its treasury of money raised by levy on the general tax-list, is so much of the cost and expense of the improvement as is not assessed against the property holders, and as to that part said Section 2702 is applicable, and must be complied with in order to make the municipality liable for such part of the cost and expense.”

Section 2702, it may be remarked, parenthetically, required municipalities to have the money in the treasury before appropriating or spending it, and, in the language of the opinion in the foregoing case, at p. 294—

“This can only apply to money raised, or to be raised, by a levy on the general tax list of the municipality.”

In *Emmert v. City of Elyria*, 74 O. S., 125, the point seems to be decided that the same provision of the present code (Section 45) making the same requirement in this respect as Section 2702 of the former code, does not apply, not because the character of the corporation's share is different, but because by the provision of the new code (Section 53), the corporation may issue its bonds to pay its share, and by Section 45a, when bonds are

sold and in process of delivery, the certificate as to the money in the treasury is dispensed with.

It may be remarked, in passing, that the said case of *Emmert v. Elyria*, *supra*, which counsel for defendants cited as decisive of the case at bar, is not in point. Neither of the points decided in that case is involved in the case at bar.

Bonds issued for the purpose mentioned in Section 53, not being then special assessment bonds, but in character like any other bonds issued to pay for improvements not specially assessed, I fail to perceive any reason why they should not be subject to the same limitations as any other improvement bonds issued by council, for their effect on the corporation's credit and finances would be the same, that is to say, they would be an obligation of the corporation and payable by general taxation and not otherwise. And it must be remembered that the avowed intention of the Legislature, in enacting the new code, was to restrict the power of municipal corporations to borrow money and contract debts. Unless Section 53 contains within itself a reason for excepting the limitation of the Longworth Bond Act, it would seem to be applicable.

It was argued that the language of Section 53 in this behalf, warranted its exclusion from that act, because it was provided that council might issue and sell the corporation's bonds, and "levy taxes in addition to all other taxes authorized by law to pay such bonds and the interest thereon." But the authority to levy taxes in addition to all other taxes authorized by law to pay such bonds and interest, in no sense removes any restrictions on the power to *issue* the bonds,. They are two separate and distinct things—the power to issue the bonds, and the power to levy a tax to pay them. The very absence of any limitation upon the power to tax in this behalf, causes one to search for the restriction, which, avowedly, the General Assembly intended to put on the power of taxation. As the power to tax in this behalf is based upon and limited only by the power to issue bonds, it would seem that it must have been intended that the power to issue bonds for this purpose should be subject to some limitation, else the power of taxation is unrestricted. And the

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only limitation the power to issue bonds in this behalf is subject to is that of the Longworth Bond Act.

The court, during the progress of its investigation in this case, thought for a while that possibly there was a consequential limitation on council's power to issue bonds for the purposes mentioned in Section 53, by reason of the fact that as special assessments could not exceed 33 1-3 per cent. of the value of the property assessed, bonds in excess of that amount could not lawfully be issued and that the extent of the improvement so to be assessed would determine the number of the intersections and the limits of the corporation's share of the cost and expenses. But a little reflection disclosed that it would be possible for the council to issue and sell bonds to create a fund to pay the corporation's share and for intersections of street and sewer improvements *which were in contemplation only*, and do so *ad libitum*, thus adding to the corporation's indebtedness to an extent which might become embarrassing, and thus evading one of the very things the General Assembly avowedly intended to prevent. It would not answer to say that such action on the part of council would be an abuse of discretion which the courts would enjoin. If the statutes permit such action, the courts would be very slow to substitute their judgment for that of the council as to where a legitimate exercise of power would shade off into an abuse of discretion. The General Assembly manifestly did not intend to repose in the power of the courts the restriction on the power of council to borrow money and contract debts. It is said it would be found in the code itself, that the grant of power would be coupled with the restriction. And so, notwithstanding the apparent duplication of power to issue such bonds in Sections 53 and 100, that construction of these provisions will be adopted which will effectuate this declared intention to restrict and not that construction which will defeat it.

But there is another consideration pertinent to this inquiry. By an act of the General Assembly, passed March 22, 1906, the whole Longworth Bond Act is re-enacted and Section 2835b thereof amended so as expressly to exclude from the provisions and limitations of the act, "bonds which are to be paid

for by assessments specially levied upon abutting property." It would seem from this action of the Legislature, that prior to the amendment, such special assessment bonds were within the provisions and limitations of the act. If they were, it was by virtue of the general terms of the act itself, or of the provisions of the latter part of Section 95 of the code, which reads as follows:

"Municipal corporations shall likewise have power to issue bonds in anticipation of special assessments, and such bonds may be in sufficient amount to pay the estimated cost and expense of the improvement for which such special assessments are levied, and in the issuance and sale of such bonds the municipality shall be governed by all the restrictions and limitations with respect to the issuance and sale of other bonds, and the assessments as paid shall be applied to the liquidation of said bonds."

If they were within the provisions and limitations of the Longworth Act solely by virtue of the reference to the "restrictions and limitations with respect to the issuance and sale of other bonds," contained in the latter part of Section 95, why, it may be asked, was not this reference stricken out of Section 95 by an amendment? This would have left Section 95 in substantially the same condition as is Section 53 so far as any specific limitation therein is concerned. It would have read as follows:

"Municipal corporations shall likewise have power to issue bonds in anticipation of special assessments, and such bonds may be in sufficient amount to pay the estimated cost and expense of the improvement for which such special assessments are levied, and the assessments as paid shall be applied to the liquidation of such bonds."

It may be observed in passing, that this reading of Section 95—which is the effect given that section by the amendment of Section 2835*b*—is an express authority to issue bonds in any amount necessary to pay for the improvement, except that part which is to be paid by the corporation. Construing together Section 95, as thus read, and Section 53, as being *in pari materia*,

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it will be seen the Legislature has *expressly* authorized council to issue bonds without limitation, to anticipate special assessments, but has not expressly so authorized where the corporation is to pay them. *Expressio unius est exclusio alterius*.

Evidently the Legislature considered that the terms of the Longworth Bond Act would still be applicable to such bonds, even with Section 95 reading as just instanced. And so, in order to take such bonds out of the operation of the act, it deemed an amendment of that act necessary, expressly withdrawing them from its operation. The reason for excluding from the operation of the act bonds which are to be paid by special assessment on abutting property is, probably, that such bonds are really not payable by the corporation, but by the owner of the assessed property, and hence the obligation is not ultimately a corporate one, and it is the power to borrow money and contract debts for and in behalf of the corporation that is liable to be abused and is intended to be restricted. While the issuance of such bonds is, indeed, a loan of corporate credit, yet the Legislature probably considered the limitation as to the amount of a special assessment a sufficient guaranty against the abuse of this power, as the assessed property owner might safely be relied on to resist an assessment in excess of 33 1-3 per cent. The Legislature having then, by express enactment, withdrawn from the operation of the act street and sewer bonds, for instance, which are to be paid by special assessment, as not being within the purview of the act, is it not a satisfactory inference that all other bonds issued to pay for street and sewer improvements, are still within and subject to the provisions of the act, especially if they are within its purview?

It has been shown, I think, that the bonds mentioned in Section 53 are not bonds which are to be paid by special assessment; it has been shown that there is no limitation to their issue, if the Longworth Bond Act does not apply; it has been shown that they come within the purview of the Longworth Bond Act—that a lack of restriction in this behalf is one of the evils sought to be prevented by that act; it has been shown that the intention of the law-making power is to restrict the powers of

taxation, assessment, borrowing money, contracting debts, and loaning their credit by municipal corporations; it has been shown that, notwithstanding bonds issued to anticipate special assessments are authorized by a special section (Section 95), which by its terms yet subjects their issue to the same limitations and restrictions as other bond issues, yet the General Assembly has expressly said they shall not be subject to the limitations and restrictions of the Longworth Bond Act, working thus an applied repeal of the limiting provisions of Section 95, and irresistibly suggesting the inference that all other improvement bonds, not somewhere also specially excepted, *are* within the provisions of the Longworth Bond Act; it has been shown that that act, as amended and re-enacted March 22, 1906, is not only the latest expression of the legislative will, several years subsequent to the adoption of Section 53, but that Section 100, partly constituted as it is, by this lately re-enacted Longworth Bond Act, is not inconsistent with the provisions of said Section 53, but, on the contrary, appears to be necessary in order to harmonize Section 53 with the declared intention of the General Assembly to restrict municipal corporations in their powers of taxation, assessment, borrowing money, contracting debts and loaning their credit. The court, therefore, can not resist the conclusion that the power to issue bonds, mentioned in Section 53, is subject to the restrictions and limitations of Section 100 of the Longworth Bond Act, as amended and re-enacted March 22, 1906, and the court so decides.

It was urged, in behalf of the sewer improvements, that considerations of the public health, etc., might dictate a different conclusion. While such considerations might induce courts to adopt a liberal construction of statutes to secure the public health, yet the courts can not legislate, and if the plain intent of the law-making power is ascertainable, no other consideration ought to rule the court than to declare it. The sewer improvement is not dictated by any imminent danger to the public health and none menaces it. If it did, the code (Section 43) provides for it.

The amendment of Section 2835*b*, of the Longworth Act, also excludes from consideration, in arriving at the limitations pro-

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vided in that act, "bonds issued for the purpose of constructing, improving and extending waterworks when the income from such waterworks is sufficient to cover the cost of all operating expenses, interest charges, and to pass a sufficient amount to a sinking fund to retire such bonds when they become due." It was admitted at the trial that the income from the Rockford waterworks is *not* sufficient to do these things. The bonds, therefore, which were issued and sold to provide for extensions, must be considered in determining the bonded indebtedness referred to in Section 2835 of the Longworth Act. Their amount is \$2,000. These appear to be the only outstanding bonds issued for any of the improvements contemplated by the Longworth Act. The difference between this amount and one per cent. of the total valuation of property in the village is \$1,583.20. An issue of the village's bonds, in excess of \$1,583.20, for any of the improvements mentioned in the petition, would clearly be illegal, unless authority should first be given by an affirmative vote of the qualified electors of said village. As the amount of bonds necessary to pay the village's share of any one of the proposed improvements will exceed what it may lawfully issue, and as the improvements must be complete to be at all servicable but can not be completed unless the village shall pay at least one-fiftieth of the cost and expenses and pay for the intersections, the proposed issue of bonds in the case of each improvement ought to be enjoined.

If enough people of the village do not approve of the proposed improvements to authorize the council to issue bonds in sufficient amount in excess of this one per cent. to pay the corporation's share and for the intersections, council will have to make the improvements separately and not so extensive as to necessitate its exceeding, in any one fiscal year, the limitation prescribed by law on its bonded indebtedness.

The several issues of bonds being illegal, they can not be said to be in process of delivery and their proceeds in the treasury, as contemplated and provided for by Section 45a of the code; and as it is admitted that no money was in the treasury to pay the village's share of the cost and expenses of the improvements

and for intersections, as required by Section 45, the contracts entered into with the defendant contractors are not binding on the village.

The foregoing considerations and conclusions render any comment on the other questions raised unnecessary.

As the plaintiff sues in behalf of the village, and the facts warrant the relief prayed for, it will be granted, and the defendants and all of them will be enjoined from entering upon the prosecution of the street and sewer work described in the petition, and the council from delivering or disposing of the bonds described therein, and the injunction heretofore granted herein will be made perpetual.

J. F. Loree and Roy E. Layton, for plaintiff.

Mauk & Jackson, J. D. Johnson and Harry Conn, for defendants.

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DISTORTION OF THE SCINTILLA RULE.

[Common Pleas Court of Cuyahoga County.]

HUGH S. QUAY V. JOHN J. QUAY ET AL.

Decided, January 29, 1906.

Trial—Duty of Judge to Direct a Verdict, When—Evidence and Proof Distinguished—Scintilla Rule as Generally Understood and Applied a Misnomer.

1. There is no place in our jurisprudence for the scintilla rule as that rule is commonly understood and generally applied.
2. When, at the close of plaintiff's evidence, defendant moves the court to direct a verdict, it is the right and duty of the judge to weigh the evidence in order to determine its probative force and effect. If the probative effect of the evidence be such that reasonable minds might reach different conclusions from it, the motion should be refused. But if the only rational view of the evidence is that it has not proved anything—if fair-minded men could not differ about it—the motion should be granted.

PHILLIPS, J.

Motion to direct a verdict.

This is an action to contest the validity of the will of Robert C. Quay, on two grounds: First, want of testamentary capacity; and second, the exercise of undue influence. The trial has proceeded in the statutory order, until the contestant has rested his case, and the defendants move the court to direct a verdict for them. On the argument of the motion, counsel for plaintiff abandons the second ground of contest—the exercise of undue influence—but contends that there is a scintilla of evidence in support of the other ground. The consideration of this motion calls for a determination of the legal effect of the evidence, under what is commonly known as the "scintilla rule."

I shall not speak of the evidence in detail, nor at length. The most that can be claimed from the evidence is, that some of it shows the testator to have been of weak mind. He certainly was eccentric; was doubtless below the average of intelligence, while some of the evidence shows him to have been of sound mind. The testimony of the only doctor that testified—and he had as

good opportunity to judge of his mental condition as any witness—is to the effect that he was of sound mind at the time he made this will. Much of the testimony relates to times more or less remote from the time of the making of the will. There is no evidence as to whether at the time he made his will he knew what property he had or that he did not know what property he had. There is no evidence upon the question as to whether he knew who were his nearest relatives, and therefore the natural objects of his bounty. There is no evidence bearing upon the question as to whether he understood what disposition of his property he was actually making.

Now, these are the criteria of testamentary capacity. The will itself, so far as it may be considered upon this question, indicates nothing out of the ordinary in his capacity, or in the disposition of his property. He had no wife living, and he had no children. His nearest relatives were two brothers, parties litigant here, and he gave all of his property to these two brothers, in unequal portions. Under the evidence there is scarcely ground for suspicion as to want of testamentary capacity; much less is there ground for a finding based upon proof.

If, under the law, the court may weigh this evidence—may consider its probative value and effect—it is clear that no rational view of this evidence would warrant the jury in finding for the plaintiff. If, on the other hand, the court may not consider the probative value and effect of the evidence, then, I suppose, the case should go to the jury, that it may weigh the evidence, for, while there is no evidence directly bearing upon the elements of testamentary capacity, there is evidence tending to show mental capacity; and this, being admitted because it is competent upon the issue as to testamentary capacity, would properly be before the jury for consideration upon that issue, if the case should go to the jury.

To determine how far the proper functions of the judge extend in this matter, we must determine the meaning and effect of the rule under consideration. I think I may safely say that there is, both with the bar and with the bench, a strong and growing sentiment against the scintilla rule, as it has been applied

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generally by our courts; and I think there is a disposition on the part of the courts to break away from it. The rule does not obtain in England, it does not obtain in any of our federal courts, and it obtains in only a very few of our state courts; but it has always obtained in Ohio. There has been a somewhat general outcry against it. The law publications have written against it, judges have scolded about it, and I believe our state bar association has more than once resolved against it. When the matter was last before our Supreme Court, four of the judges adhered to the rule, and the other two dissented in strong terms. There can be no doubt that the scintilla rule, as it has been generally understood and applied, has worked a decided hindrance to the speedy and effectual administration of justice in our courts. I think the profession has come to regard this rule as a relic that ought to be relegated. Of course, these considerations do not affect the rule itself; but this consensus of the legal and judicial mind, in which it is well known I have to some extent shared, has induced me to give the subject a somewhat careful consideration; and from such consideration, I am well convinced that there is no place in our jurisprudence for the scintilla rule, as it is commonly understood, and as it is generally applied.

I will consider first, the object of the rule of procedure which empowers the judge to control the jury by directing a verdict upon the evidence. It must be borne in mind that this question is presented in this case by the application of the defendant to the court, to determine whether or not he should proceed with his defense. The defendant virtually says to the court:

“I desire the judgment of the court now upon the present state of the case. Has anything been shown on the part of the plaintiff, he having put in all of his evidence, that changes the situation, or that calls upon me to meet it with evidence, with proof?”

This is a recognized practice; it has been recognized in all time. The court is now confronted with that question, and must determine it upon principles consistent with the rights of both parties, and consistent with settled rules of procedure.

Courts are organized and maintained to determine real controversies, and only such real controversies as apparently have legal merit on both sides of the contention. To this end pleadings are required; to this end a censorship of the pleadings is provided, by motion and demurrer, to obtain, in advance of a trial, the judgment of the court as to whether there is a real controversy, having apparently legal merit on both sides. And whenever, during the trial, it appears to the court that there is no real controversy to be tried, the court may, and should, stop the trial. The court may exclude any and all evidence at the outset of the trial, on the ground that the plaintiff has not stated any right of action, has not come in with a complaint that entitles him to the intervention of the court. The court may arrest the case, perhaps, at any stage of it before it goes to the jury, and direct a verdict for the defendant, when it is clear that the plaintiff can not have a verdict rightfully. The court may arrest judgment after a verdict; the court may always stop the trial of a case when it appears in any way, when it comes to the knowledge of the court in any way, that the court has not jurisdiction, because the trial would necessarily be fruitless—because there is nothing to be tried; there is no real controversy before a real tribunal having jurisdiction over it.

A case was heard in this room within a few days, where the plaintiff was called to the stand, and from his own testimony it appeared that he was not the real party prosecuting the case. He did not have any law suit here; he was not in favor of it; he never had been in favor of it; he did not claim anything from it. A certain lawyer and a certain doctor had gone to him, he not understanding the English language, and procured him to make his mark to the petition. A motion was made to dismiss the case, and it was promptly dismissed. Now, there was more than a scintilla of evidence in that case, tending to prove the right of the plaintiff to damages that were claimed in the petition for him—more than a scintilla; but did that stand in the way of the court arresting the trial at that moment? It would have been a travesty of justice to proceed further with the trial. And so it is within the province of the court, and

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it is the duty of the court, whenever it appears in the progress of a trial, when it appears with certainty, and of that the judge is to determine, that there is no real controversy. When it appears that there is nothing for the jury to try and to determine, the court ought to stop the trial; and this well accords with the judicial motive.

Plainly stated, this motion presents the question, whether this trial should proceed; and the propriety of proceeding further is challenged on the ground that it now appears that in no event can the party seeking relief obtain it rightfully. This is a question that is always pertinent; it is always germane to the trial; it is all the time impending. This challenge of the propriety of proceeding further is based upon the plaintiff's evidence. It presents the question whether, upon this evidence, a verdict can be given for the plaintiff. How given? Wrongfully given? Given by mistake? No; whether it can be rightfully given. The presumption must be, that the jury would return a right verdict on this evidence; but it certainly is both safe and fair to assume that if no rational view of this evidence would warrant a verdict for plaintiff, the jury could not find for him; and it is certainly fair to the plaintiff, in such state of the evidence, to arrest his case; and it accords well with the judicial motive to say to him:

“Since you have shown that you have no right to a verdict, you shall not be allowed to experiment with the jury, for no other purpose than to see if you can get from them something that it now appears you are not entitled to.”

Such procedure would be the merest travesty of justice.

Such motion necessarily requires a consideration of the evidence; for it presents the question whether the plaintiff can rightfully have a verdict, first, as a matter of legitimate inference and deduction from the evidence, and second, as a matter of law. And in determining the former question, the thing to be determined is, not whether some witness has said something that would tend to sustain the plaintiff, but, what is the probative force and effect of this evidence? Such motion does not admit all that any witness has said—it concedes all the facts of which there is any appreciative degree of proof. It admits, not the evidence, not all

the facts that might possibly be surmised therefrom, but all the rational conclusions which the jury may rightfully and lawfully draw therefrom.

Having considered the purpose of the rule of procedure which empowers the judge to direct a verdict, and seeing that it requires a consideration of the evidence, with a view to determining whether any rational view of it will tend to the proof of plaintiff's ground of action, I come now to a consideration of the limitation placed upon the court, by another well-settled rule, that the weighing of the evidence, and the findings therefrom, belong exclusively to the jury.

The Supreme Court of the United States in an opinion delivered by Justice Swayne, in *Hickman v. Jones*, 76 U. S. (9 Wall.), 197, 201, says:

"The instruction given overlooked the line which separates two separate spheres of duty. Though correlative, they are distinct, and it is important to the right administration of justice that they should be kept so. It is as much within the province of the jury to decide questions of fact as of the court to decide questions of law. The jury should take the law as laid down by the court and give it full effect. But its application to the facts—and the facts themselves—it is for them to determine. These are the checks and balances which give to the trial by jury its value. Experience has proved their importance. They are indispensable to the harmony and proper efficacy of the system. Such is the law."

Justice Swayne says further:

"Where there is no evidence, or such defect in it that the law will not permit a verdict for the plaintiff to be given, such instructions may be properly demanded, and it is the duty of the court to give it. To refuse is error."

Nothing is better settled, and nothing is more essential to the trial by jury, than that the court shall not invade the province of the jury. And it is in the application of this doctrine, or rather, the misapplication of it, that the right of the judge to direct a verdict has been so hampered and limited by the scintilla rule, as to make that rule a means of retarding, rather than promoting, the speedy and efficient administration of justice.

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This limitation requires us to distinguish between the facts that the judge may determine and those that belong exclusively to the jury. And upon this point I read a part of 1 Jones Evidence, Section 171:

“It is a familiar rule that the judge has to determine all questions of law that arise in the trial of a case, and that the jury are to find the facts from the evidence introduced. But as a matter of fact, judges frequently decide questions of fact and jurors apply the law as given by the court to the questions of fact involved. The jury decides upon the weight of the evidence and upon the credibility of the witnesses, the judge passes upon the competency of the witnesses and upon the admissibility of the evidence offered. The sphere of the jury as compared with that of the judge is a limited one. The judge in a large degree controls and guides the action of a jury from the beginning to the end of the trial. The work of the jury is confined to the determination of the ultimate facts which are the subject of the issue. The preliminary issues of facts that arise during the trial are, with few exceptions, determined by the judge.”

As I have shown, this question that is presented by a motion to direct a verdict, is a preliminary question. It arises during the course of the trial. It is preliminary to the introduction of evidence on the part of the defendant. It is as purely preliminary and distinct from the final decision upon the issues in the case by the jury as any other well-known preliminary part of the proceeding. The jury is to decide the issues; and, of course, they can do this only when more than one rational conclusion can be drawn from the evidence, for only in such case could there be anything to decide.

The drawing of rational conclusions from evidence, appeals to a standard of judgment that belongs to the man of average intelligence, when free from bias. And this standard belongs to the court, as well as to the jury. The jury has no monopoly of it, and the court has no monopoly of it. The judge, in passing upon a motion to direct a verdict, deals with a preliminary question; and he can arrest the case from the jury only when the only rational view of the evidence is, that it shows there is nothing to be decided by the jury.

The jury decides according to the preponderance of the evidence—the court can not do this. There must be only one rational conclusion that can be drawn from the evidence to authorize the judge to interfere. If different minds might reach different conclusions, it must go to the jury; for then there is some doubt about it—there is then a chance that the judge might go wrong. But if there is only one rational conclusion from the evidence, the judge can not go wrong, and his interference does not impinge upon the functions of the jury. He decides, as he alone can decide, that there is nothing to invoke the functions of the jury, for there is no evidence that will enable them to decide the issues.

I think the courts have been led to a wrong interpretation, and a wrong application of this rule, by a confusion of terms. The terms “evidence” and “proof” are very commonly confused by all of us. They have different meanings. They must be distinguished, and especially in the consideration of this rule must they be distinguished, and it is the failure to distinguish between them that I think has led to a wrong application of this rule—indeed, to a wrong formulation of it.

Evidence means whatever tends to prove or disprove a fact in issue. It includes testimony—and by testimony I mean the oral statement of the witness, whether from the witness stand, or in deposition—and it includes as well records and writings, or exhibits. This is all evidence. Proof is the result of evidence. It results as the probative effect of evidence, and it is the conviction or persuasion of the mind resulting from a consideration of evidence.

The rule under consideration has to do with the proof, and not with the evidence. It is only when the probative effect of evidence is to make some proof tending to support the plaintiff's claim that he is entitled to have the jury pass upon it. Not until then is the defendant called upon to introduce any evidence; not until then is there anything for him to meet with his evidence.

The courts have, in the application of this rule, confounded, or have not always distinguished, evidence and proof; and, there-

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fore, have applied the rule where there was some evidence, regardless of the probative effect of the evidence, declining to weigh it, leaving it to the jury. I think it unfortunate that the term "scintilla" was adopted in the formulation of this rule. It can have no possible application to the principles involved in the rule. Scintilla is a pure Latin word and means literally, a spark, a glimmer. Its figurative meaning is, the least conceivable particle, a trace. Nothing could be minimized more effectually than to apply to it this term "scintilla" in either its literal or its figurative sense.

Now, by giving controlling effect to this word "scintilla," which is only used figuratively, and by applying it to the evidence, instead of to the proof, the rule has been distorted to mean, that where there is the slightest particle of evidence tending to make proof for the plaintiff, the court can not interfere, and this has restrained the courts from weighing the evidence upon such motion. I think this confusion of terms is apparent in the formulation of this rule made by the very distinguished jurist, Judge Ranney. In the case of *Ellis v. Insurance Co.*, 4 Ohio St., 628, 645, he says:

"When all the evidence offered by the plaintiff has been given, and a motion for a non-suit is interposed, a *question of law* is presented, whether the evidence before the jury *tends* to prove all the facts involved in the right of action, and put in issue by the pleadings. In deciding this question, no finding of facts by the court is required, and no weighing of the evidence is permitted. All that the evidence in any degree *tends* to prove must be received as fully proved."

With the greatest deference to Judge Ranney, I think he has fallen into the error that I have been trying to point out.

I now call attention to some Ohio cases which I think show the trend of opinion in our Supreme Court to be in the direction of what I have been saying.

First, I call attention to the case of *People's & Drivers' Bank v. Craig*, 63 Ohio St., 374. One paragraph of the syllabus is:

"When the controlling facts are conceded on the trial, it is not error for the court to direct the jury to bring in a verdict in accordance with such facts."

Now, the entire function of the jury, as I have shown before, is to weigh the evidence and determine the facts, and then to apply the law that the court gives to the facts; so that it is a part of the function of the jury to make application of the law to the ascertained facts. But when the facts are conceded, when there are no facts to be determined by the jury, then so much of the function of the jury is eliminated, and the court can as well apply the law to the settled facts, or ascertained facts, or conceded facts, as the jury can, and our Supreme Court has held that it is no invasion of the province of the jury in that condition of case, for the court to determine that matter and make the application of the law to the facts. The full function of the jury is not invoked, and the court can as well, if not better, make the application, as the jury.

There is a case decided by our circuit court, Hale, Marvin and Laubie, Judge Laubie delivering the opinion, *Cleveland Elec. Ry. v. Wadsworth*, 1 C. C.—N. S., 483. The second paragraph of the syllabus is in these words:

“Where the only rational conclusion from the evidence in an action for personal injuries is, that the plaintiff’s negligence contributed to his injury, the case should be taken from the jury and judgment rendered for the defendant.”

Upon a motion of this kind, there is a clear and explicit recognition of the right of the judge to weigh the evidence, where the only rational conclusion from the evidence is, that the plaintiff was negligent. How is that to be determined except by weighing his evidence? The court can not balance the matter; the court can not determine that by a mere preponderance of the evidence. If it presents that kind of question, it must go to the jury, because when it presents that kind of question, the plaintiff is entitled to have the verdict of the jury upon it, because different minds may differ about it. But when there is no rational conclusions from the weighing of the evidence but that the plaintiff was negligent, and that his negligence contributed to the injury he complains of, there is nothing to go to the jury. In determining that question, of course, the court must find the probative value and effect of the plaintiff’s evidence.

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In the case of *Cincinnati St. Ry. v. Snell*, 54 Ohio St., 197, the Supreme Court states the negative of the rule that I have just read from our circuit court decisions. The fourth paragraph of the syllabus is:

“Where the evidence of the plaintiff shows actionable negligence on the part of the company, and the question of contributory negligence of the plaintiff depends upon a variety of circumstances from which different minds may reasonably arrive at different conclusions as to whether there was contributory negligence or not, the question should be submitted to the jury under proper instructions; and it is error in such case for the court to direct a verdict for the defendant.”

In *Nelson Business College Co. v. Lloyd*, 60 Ohio St., 448, 459, Judge Minshall, in discussing this question, says:

“But it must be observed, that this is the inference the defendant would have drawn from the evidence; but, certainly, an impartial mind may draw from it the former conclusion; and this shows that, from the same evidence, different minds may draw different conclusions—one favorable, and the other unfavorable, to the claim of the plaintiff; and hence the evidence should have been submitted to the jury under proper instructions as to the law.”

Then Judge Minshall says:

“This is the proper rule in determining whether a verdict should be directed in any case. The so-called ‘scintilla rule,’ frequently applied as a stigma to the practice that requires the case to be submitted to the jury when there is any evidence to support the plaintiff’s case, is better calculated to confuse than enlighten the mind.”

A good statement of the doctrine, as I think it is, is to be found in 1 Jones, Evidence, Section 171, where the author says:

“It is also in the province of the judge to determine whether there is sufficient evidence in the case to warrant its submission to the jury. If there is such evidence as would cause reasonable men to draw different conclusions, the case should be submitted to the jury. But a mere scintilla of evidence, or mere surmise, will not sustain a refusal on the part of the judge to take the case from the jury and to grant a non-suit. The recent decisions have extended the province of the judge in such cases, and have completely exploded the old doctrine by which a judge was

compelled to submit the case to the jury if there was a scintilla of evidence to support the claim of the plaintiff.

"In place of the old rule has come the more reasonable one, that in every case there is a preliminary question for the judge, whether there is evidence upon which the jury may properly proceed to find a verdict when the evidence with all the inferences that the jury can justifiably draw from it is insufficient to support a verdict for the plaintiff, it is the duty of the court to take the case from the jury and to direct a verdict, or grant a non-suit as the facts of the case may warrant. It is proper for the court to so instruct the jury, when the evidence has been too loose and inconclusive, to establish the facts sought to be proved without indulging in mere conjecture or speculation. But the judge should not in so doing encroach upon the province of the jury by dictating or influencing their verdict when there is any sufficient evidence which tends to show that there are two sides to the controversy."

I read now from *Cincinnati St. Ry. v. Snell, supra*, the part of the dissenting opinion of Judge Shauck, concurred in by Judge Burket, which relates to this question. Be it borne in mind that the majority of the Supreme Court find that the trial judge did wrong in arresting the case from the jury. These dissenting judges say, page 213:

"The course of the trial judge in this case is worthy of commendation. Having devoted enough time to the orderly examination of the case to disclose a conclusive reason why the plaintiff could not recover a verdict according to law, he directed the verdict which the law required. The plaintiff had no constitutional or legal right to recover a verdict upon which he could not recover a judgment. Had the case been submitted to the jury upon general instructions, the court would not have been sitting to administer justice, but to experiment with a verdict. Such a course was required by no right of the plaintiff. It was forbidden by justice to the defendant and by a due regard for the rights of the public in a speedy administration of justice."

I conclude, that when, in a civil action, the plaintiff has introduced his evidence and rested, and the defendant moves the court to direct a verdict for him, the court is called upon to determine whether the situation of the case is such that the defendant is called upon to introduce any evidence. Stated differently, the court is called upon to say whether the evidence

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for the plaintiff has changed the situation. Stated in fewer words, has the plaintiff proved anything? If the plaintiff, having the burden, has not proved anything, there is no occasion for the defendant to offer evidence, for there is nothing for him to prove or disprove, and he is entitled to a verdict, just as if the plaintiff had offered no evidence; for evidence does not avail, unless it proves something—under this rule, it is proof that avails, and not mere evidence.

To determine whether anything has been proved, the court must consider the evidence to ascertain its probative force. This is weighing the evidence, and this the court must do, for there is no other way of determining the question with which the court is confronted.

But if, upon such consideration of the evidence, the question of proof or no proof is in any appreciable degree doubtful; if the state of the evidence be such that different minds might differ about it, then the plaintiff's evidence has changed the situation, and the defendant is called upon to make some proof, and the trial should go on. This is so, for this reason: The parties having made up an issue worthy of trial by jury, and having entered upon a trial to a jury, each is entitled to have it proceed to the jury, until it shall appear that there can be nothing for the jury to decide; and if the probative effect of the plaintiff's evidence is such that different minds might differ about it, he has made so much of a case that he is entitled to a verdict upon a preponderance of the evidence, and this invokes a function of the jury. But, on the other hand, if the only rational view of the evidence is that it has not proved anything—if fair-minded men could not differ about it—it can in no way affect the issue, and should not be submitted to the jury, for the jury deals only with the issues.

I have received these views with some trepidation, for some may regard my position as one of insubordination. I realize full well the duty of an inferior court in this regard. I have no intention to fly in the face of the Supreme Court, and I think I have not done so. I have followed what seems to me the invincible and inexorable logic of the situation; and if I am not

mistaken, my conclusions have at least the *quasi* sanction of what seems to me the certain trend of opinion in that court.

Motion granted, and verdict directed.

M. B. Excell, for plaintiff.

W. L. Clark, for defendants.

THE PLEA OF CONTRIBUTORY NEGLIGENCE.

[Common Pleas Court of Licking County.]

WILLIAM VANATTA V. THE BALTIMORE & OHIO RAILROAD
COMPANY.

Decided, October, 1906.

Pleading—Contributory Negligence as a Defense—Acts which Constitute, Must be Set Out—Motion to Strike Out.

Where a defendant pleads contributory negligence in an action for damages on account of negligence, he may be required to set out the acts of negligence on the part of the plaintiff upon which he relies.

SEWARD, J. (orally).

This case is submitted to the court upon a motion to strike from the answer the second defense, which is a plea of contributory negligence, without setting out what acts constitute the contributory negligence. This court held in the cases of *Rector v. The Columbus, Buckeye Lake & Newark Traction Company* and *Priest v. The Columbus, Buckeye Lake & Newark Traction Company*, that a pleading setting up contributory negligence, without setting out the acts constituting the contributory negligence, is not good pleading; and the court cited at that time, without reading it, a case in the 118 Federal Reporter, 653, which seems to be decisive, if it is good law, of this contention. Counsel for the defendant have cited the court to the decision of Judge Belden of Butler county, which holds to the contrary, and there is some difference of opinion of courts. The matter has never been decided by the Supreme Court, but this court thought that good reason indicated that a defendant

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who pleaded contributory negligence as against the plaintiff's claim should be held to the same rule of pleading as the plaintiff would be held to if pleading were filed charging the defendant with negligence, without stating what acts constitute the negligence; and a demurrer would be good as to that, or a motion to make it more definite and certain, by setting out the acts which constitute the negligence. The question ought to be presented to the Supreme Court, and passed upon by that court.

The case in the 118 Federal Reporter, page 653, is *McInerney v. Virginia-Carolina Chemical Co.*, decided by the Circuit Court of South Carolina, I quote:

"[*Contributory negligence.*] Under the rule of code pleading that the facts relied on be stated in a clear and concise manner, an answer alleging that the injuries causing the death of plaintiff's intestate arose from his carelessness, negligence, and fault may be required to be made more definite."

The court say:

"These are motions to make the answer and the amended answer more definite and certain. The complaint seeks damages for personal injuries to the plaintiff's intestate caused by the alleged negligence of defendant. It states that the intestate was a stevedore at work unloading cargo from a steamship at defendant's wharves.

"The mode of presenting the defense of contributory negligence used by the defendant in this case is in accordance with the practice which has prevailed in South Carolina since the adoption of code pleading, in 1870. No question has been made of it at any time, at least none which has been passed upon in any reported case. It is therefore *res integra* in this jurisdiction. But if the practice be tested by the rules of code pleading, it will appear that it is defective. The rule governing all code pleading—complaint and answer—is that the facts relied upon be stated in a clear and concise manner, and from the facts so stated the legal conclusion is drawn."

That is, the facts shall be stated in a clear and concise manner, and not conclusions from the facts.

"If a defendant charged with negligence relies on contributory negligence on the part of the plaintiff, he must plead it specially, and when pleaded the burden of proof is on him to maintain it (*Railroad Co. v. Horst*, 93 U. S., 298). It is an

affirmative defense in the nature of a plea of confession and avoidance.

"This defense goes farther than a denial. Under the defense of a general denial, the plaintiff must prove that the negligence of the defendant was the proximate cause of the injury. And the defendant can introduce any evidence contradicting that. He may show that his conduct in no wise contributed to the injury, and may go farther, and show that the injury was caused wholly by the act of the plaintiff. But where he sets up the defense of contributory negligence, he, in effect, says: 'It may be true that I was negligent, but at the same time I can show that you also were negligent, and so notwithstanding my negligence you can not recover.' In other words, by inserting this defense, he introduces new matter—other facts, which, if they do not justify him, debar the plaintiff. And under the rule of code pleading he must set out concisely these facts from which the legal conclusion can be drawn. Before the plaintiff can recover, he must set out, as well as prove, the specific acts of defendant by which negligence will appear; and so, when defendant relies for his defense on the contemporaneous negligence of plaintiff, he must set out the facts—the specific acts of plaintiff by which his negligence will appear. To put it another way: If defendant wishes to rely upon the rule that the plaintiff must prove his case, the general denial would accomplish his purpose. If he intends to go beyond this, and to avail himself of a defense, notwithstanding that negligence may be proved against him, by showing contributory negligence on the part of the plaintiff, he must state his facts upon which he relies, from which negligence could be inferred."

This court is abundantly satisfied with its former holding. This is a motion to strike this second defense from the answer. The court does not think that motion can be sustained, but the court will treat it as a motion to make more definite and certain, and will order the second defense in the answer to be made more definite and certain.

Smythe & Smythe and Russell & Horner, for plaintiff.

Kibler & Montgomery, for defendant.

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PROCEEDINGS RELATING TO COUNTY DITCHES.

[Common Pleas Court of Defiance County.]

ANDREW M. ANDERSON ET AL V. THE VILLAGE OF HICKSVILLE ET AL;
AND BROWN ANDERSON ET AL V. THE BOARD OF COM-
MISSIONERS OF DEFIANCE COUNTY, OHIO.

Decided, November, 1906.

Ditches—Several Joined in One Improvement—Questions Relating to Bond for Costs—Injunction will not Lie Against Improvement, When—Notice—View by Commissioners—Benefits—Injury to Lands—Character of Improvement—Sections 4448, 4451, 4452 and 4491.

1. Water-courses which empty one into another and that one into a third are not separate water-courses within the meaning of the statutes relating to the construction or improvement of public ditches, and may be joined in one improvement.
2. Petitioners for the improvement of a public ditch may become sureties on the bond which it is required shall be filed with the petition for payment of costs; failure of the county auditor to endorse his approval on such a bond is immaterial, where a bond properly executed was filed with him for approval, and he identifies it as the bond then on file, and testifies that he did approve it.
3. Section 4452 does not contemplate that the commissioners shall actually set foot on the whole line of the ditch, but that they will at the beginning of the improvement hear the complaints of the persons affected, and thereafter view the line of the ditch in such a manner that they will understand the situation, and can determine the necessity of the improvement, and make a proper apportionment of the costs.
4. In a proceeding for a ditch improvement, an injunction will not lie because of errors apparent on the face of the record, such as a defect in the bond filed with the petition; nor where there is no evidence of collusion or fraud on the part of the commissioners; nor because of injury to the lands through which the ditch passes; nor on allegations that the improvement is of an unsatisfactory character, or that there is no necessity for it, or that no benefit will result to the lands through which it passes.

SNOOK, J.

These two cases involve the validity of the same ditch proceeding, and were submitted to the court together; while there are some issues in one not found in the other, in deciding the cases I have discussed the questions involved as though they were raised on one petition.

On the 25th day of July, 1904, George Tracts and others filed their petition with the Board of Commissioners of Defiance County, Ohio, praying for the deepening, widening and straightening of a certain ditch known as North Gordon Creek, and its laterals, Middle Gordon Creek and Mill Creek. On the same day the petitioner filed his bond, signed by himself and several others, all signers of the original petition. The hearing was set for August 23, 1904, at the head of North Gordon Creek; and the petitioner was required to cause notice to be given all persons and corporations affected thereby, and of the time and place of said hearing. Notice was given and proof of the service thereof was duly filed in said proceedings. On August 23, the commissioners met at the head of North Gordon Creek, and heard the complaints of those present, and adjourned to the 19th day of September, 1904. On September 19, at a meeting of the board, they found that the improvement was necessary and established the same, and ordered the surveyor to survey and level the same, and apportion the cost of construction thereof; and fixed January 30, 1905, as the day for the next hearing in the matter. On January 30, said matter was continued to February 13. On February 13, the board met and partially confirmed the report of the surveyor, with certain amendments thereto; and on February 14, the board further amended said report and adjourned to February 27, at which time they met and passed on all claims for compensation and damage, and finally approved the report of the surveyor.

The plaintiffs seek to enjoin the construction of said improvement, and urge very many reasons why a court of equity should enjoin all further proceedings in the matter. The plaintiffs, and each of them, are owners of land lying along the line of said improvement assessed for the construction of the same.

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The first ground urged for consideration is that North Gordon, Middle Gordon and Mill Creeks are each separate water-courses and are not laterals, spurs, or branch ditches, so that they can be joined in one improvement. The language of the statute, Section 4448, is—

“The petition for any such improvement shall be held to include any side, lateral, spur, or branch ditch, drain or water-course, necessary to secure the object of the improvement, whether the same is mentioned therein (petition) or not.”

The evidence shows that all these ditches, down to the point of the junction of Middle Gordon with North Gordon, are small runs, without natural banks or bluffs, bearing the character of many of the small creeks in this country flowing through level lands. Mill Creek is a tributary of Middle Gordon, and Middle Gordon of North Gordon; and the improvement of North Gordon below the point where Middle Gordon empties into it, will affect both Middle Gordon and Mill Creek, and the improvement of Middle Gordon below the point where Mill Creek empties into it will affect both. So it follows that the statute referred to, if not made to cover such a case as this, will have no meaning whatever, and will apply in no case where there are several branches to a ditch improvement.

The second claim is that there was no bond filed in the proceeding, or, rather, that the paper purporting to be a bond is not such a bond as is required by law. The bond was filed in the proceeding with the county auditor, on July 25, 1904, and is signed by the petitioner and several other signers of the petition. It is claimed that the signers of the petition for the improvement can not become sureties on the bond. The language of the Revised Statutes, Section 4451, is:

“And there shall be filed therewith (the petition) a bond, subject to the approval of said auditor, payable to the state of Ohio, with at least two sufficient sureties, in not less than two hundred dollars, conditioned for the payment of all costs, if the prayer of the petition be not granted.”

That the petitioners may become sureties on the bond is settled by *Keys v. Williamson*, 31 O. S., 561. It is true that the

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Supreme Court there had under consideration the provisions of the township ditch law, now embodied in Revised Statutes, Section 4514, but the language there used as to sureties is substantially the same as used in Section 4451. The one says, "with at least two sufficient sureties," and the other says, "with good and sufficient sureties."

The Keys case, therefore, makes it clear that the petitioners for the ditch may become sureties on the bond. Neither does the fact that the county auditor did not endorse his approval on the bond render it void. The language of Section 4450 is "a bond subject to the approval of the auditor." There is no provision that his approval must be endorsed on the bond. The auditor identifies the bond now found among the files as the one filed with him in the matter, on July 25, 1904, and says that he then approved it. Besides, the rule is, if a bond is delivered for approval to the proper officer, it becomes a binding obligation, unless actually disapproved. See Note C to *Estate of Ramsey v. People*, 90 Am. St. Rep., p. 190; *Place v. Taylor*, 22 O. S., opinion of court, p. 320.

Is the bond void because the names of the sureties were left out of the body, because the date of the filing of the petition for the ditch is left blank, and because there was not filled in the blank in the body of the bond the words "deepening, widening and straightening?" This question is discussed in the cases referred to in the note to *Estate of Ramsey v. People*, 90 Am. St. Rep., 197, and, without quoting from it at length, we think these cases make it plain that such omissions from the body of the bond do not make the bond void. Moreover, I have examined the opinion of Judge Killits, in the case of *Cooper v. Commissioners of Van Wert County*, and have conferred with counsel as to the decisions of the circuit court in that case, and am not yet prepared to say that this authority settles the question, that a defect apparent on the face of a bond filed in a county ditch proceeding is ground for an injunction. It must be remembered, in a discussion of this question, that the decision of the Supreme Court in the case of *Sessions v. Crunkilton*, 20 O. S., 349, construed the provisions

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of the township ditch law, and that the court, in that case, were in no wise called upon to offer an opinion as to the provisions of the county ditch law. As I read this decision, it turns on the wording of the statute, which requires that the bond must be filed before the trustees can take any steps to establish the ditch. The language of the statute there under construction is now embodied in Revised Statutes, Section 4514, and reads:

“Before the trustees can take any action towards locating or establishing any ditch, there must be filed with the township clerk a bond with good and sufficient sureties.”

And Section 4520 provides:

“If the trustees find that the bond has been filed and notice given, they shall proceed.”

It will be observed that these statutes clearly make the giving of the bond a condition precedent to any action on the part of the trustees, and a careful reading of the case of *Sessions v. Crunkilton* will show that the discussion of the court is based upon the provisions of these two statutes to which I have referred. The county ditch law contains no such provisions, and makes no such limitation to the powers of the commissioners. Under the provisions of the county ditch law, the prayer of the petition having been granted, and an order made establishing the improvement, I doubt if the Supreme Court would enjoin the construction of a county ditch for want of a bond. We think this question of the right to enjoin because of a defect in the bond is answered by the Supreme Court in the case of *Haff v. Fuller*, 45 O. S., 495, see opinion, page 497, where the court say:

“In this state the proceedings and final orders of township trustees and county commissioners establishing ditches and roads may be reviewed by petition in error, and reversed for errors appearing on the record. The remedy thus afforded, being adequate for the correction of errors in such proceedings which are disclosed by the record; the rule already stated has been applied in such cases, though the errors so appearing rendered the proceedings void for want of jurisdiction.”

See, also, *Frevort v. Finfrook*, 31 O. S., 621, where the court say:

“Where the irregularity of the proceedings is the ground of objection, the claimant will not be permitted to resort to the remedy of injunction, but will be confined to his appeal, or, if the proceedings are so erroneous as to be reversible, to his petition in error.”

See, also, *McClelland v. Miller*, 28 O. S., 488.

These cases make it plain that in a ditch proceeding injunction will not lie because of errors apparent on the face of the record.

It is further claimed that plaintiffs did not have legal notice of the proceeding. It is first claimed that the notice to meet at the beginning of North Gordon is not sufficient to satisfy the language of the statute. The statute says, Section 4451a, that the notice shall set forth the substance, prayer and pendency of the petition. The notice, as served, complies with this language. Moreover, it is disclosed by the record and testimony, that the plaintiffs took part in the proceedings at different stages, and this would take the place of notice. It is complained that the notice to non-residents is not good, because it failed to name the landowners to whom it was directed. This contention is answered by the Supreme Court, in *Miller v. Graham*, 17 O. S., p. 8, where it is held that notice similar to that in this case is sufficient.

It is also claimed in argument that persons or corporations who are not parties to the suit, but who are parties to the ditch proceeding, were not properly notified, and that this is ground for injunction on the part of the plaintiffs. We think there is nothing in this contention. The statute provides that all suits must be brought in the name of the real party in interest, and the Supreme Court, in the case of *Board of Education v. Guy*, 64 O. S., 445, say:

“To warrant a recovery on the petition, it must show a cause of action in the plaintiff.”

See, also, 36 O. S., 68, and opinion, p. 78.

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It is claimed that the commissioners did not comply with the provisions of Section 4452 as to a view of the line of the proposed improvement. We do not believe that this statute contemplates that the commissioners must actually set foot on every inch of the line of the ditch, but that they shall meet at the beginning of the improvement, hear such complaints as the persons affected may have to offer, and thereafter view the line of the ditch in such a manner as they may understand the situation and lay of the land along the same, so as to determine the necessity of the same and so that they may be able to make an apportionment of the costs of the improvement. We think the testimony shows that the commissioners substantially complied with this provision of the statute.

It is claimed that there is no necessity for the improvement. This raises the question as to whether or not it conduces to the public health, convenience or welfare, and must be decided by the commissioners in the first instance, and their decision in this behalf can not be controlled by a court of equity. A party aggrieved on this question must pursue the remedy by appeal (see Revised Statutes, Section 4460). Neither do we think that the decision of the commissioners as to the size of the ditch can be controlled by a court of equity, but if this were a question to be decided by the court, we are not prepared to say that it has been shown by proof that the proposed improvement will be too large.

It is also claimed that the real object of the improvement is to furnish an outlet for the sewage of the village of Hicksville. Without stopping to analyze the evidence, all we care to say on this subject is, that this allegation of the petition has not been established by the evidence. But the court is of the opinion that the language of the entry in this case should be so worded and guarded that this decision can never be used in the future to bar any one along the line of the ditch from bringing an injunction suit to prevent the emptying of the sewerage of the village of Hicksville into this improvement.

Nearly all the plaintiffs take the stand and testify that their lands will in no wise be benefited by the proposed improvement.

But the evidence, taken as a whole, seems to contradict these broad statements and to show that there is a necessity for the improvement of these ditches, and that such improvement will be a benefit to the lands lying adjacent thereto.

There seems to be a misunderstanding of the jurisdiction of a court of equity to enjoin an assessment for a ditch improvement, where the only allegation in the petition is the bare statement that the improvement will not benefit the lands of the petitioners, and the proof to support such allegations is a statement that the claimants' lands will, in no wise, be benefited. There are at least four cases referred to in the law bulletin, affirmed by the Supreme Court without report, where it is held that a petition containing only the statement in substance that the proposed improvement, when constructed, will not and can not be of any benefit to the lands of the complainants, is not good as against demurrer. I refer to the cases of *McAdams v. Comrs.*, 22 W. L. B., 206, and the three cases referred to in 37 W. L. B., 189 and 191.

In *Miller v. Board of Comrs.*, 3 C. C. Rep., in the opinion, on page 619, our own circuit court, in speaking of this question of benefit, say:

"Unless it is shown that there is some collusion, fraud, or positive wrong perpetrated, the action of the board in this particular will not be disturbed."

We believe that if the decisions are carefully read, they will show, that in order to disturb the assessment, it must be shown that the commissioners committed some fraud or mistake. We are cited to the case of *Blue v. Wentz*, 54 O. S., 247. There it was held that the petition made a good case, but it was on the ground that the facts plead showed that the commissioners had made a mistake in making the assessment; that is, the facts showed that the commissioners had made the assessment on a mistaken or wrong basis. And in *Buckley v. Comrs.*, 1st Cir. Court Rep., 251, the relief was based on a mistake on the part of the commissioners, and this is always ground for relief in equity. Further, it is doubtful if Section 4491 applies to this kind of a case at all, as it only provides for proceedings to lo-

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cate and establish ditches, and if we are to adopt the reasoning of Judge Killits, in the Cooper case, it certainly does not apply. There was no proof offered to support the allegation of misrepresentation or fraud on the part of the commissioners, as to the day set for the filing and hearing claims for compensation and damage, and no proof of collusion between the commissioners and the officers of the village of Hicksville.

The claim that plaintiffs' lands will be cut through and occupied, and damaged, affords no ground for injunction, as the plaintiffs have a right to appeal on this question.

Lastly: Should an injunction be granted on the ground that the improvement will not afford a sufficient outlet?

This question has given the court more trouble than any other in the case, but after going over the evidence on this subject thoroughly, we are not prepared to say, taking into account the nature of the improvement, and the nature of the creek at the terminus of the improvement proposed, that a sufficient outlet will not be afforded by this improvement. Neither are we clear that this question can be made in this case by the petitioners. In the case of *McAdams v. Comrs.*, 22 W. L. B., 206, already referred to, it was held, that this provision of the statute refers to the escape of the water at the mouth of the ditch. The plaintiffs seeking the injunction along the line of the ditch are above this point and there is nothing in the evidence to show that they are, in any way, injured because of the size of the ditch at the outlet. We have shown that it is plain that the plaintiff must recover on his own case; that is, to warrant a recovery on the petition, a cause of action must be shown in the plaintiff. See, 64 O. S., 445; 36 O. S., 78. On this question we also offer the query as to whether or not this question should not have been reached by appeal, and whether or not it is not covered by that provision in the statute for appeal, wherein it is provided that an appeal may be had as to whether or not the route of the ditch is practicable?

For these reasons, the temporary injunctions in these cases will be dissolved.

Newbegin & Newbegin, for plaintiffs.

David Oflander and Harris & Cameron, for defendants.

VOLUNTARY ASSOCIATIONS OF BUSINESS CONCERNS.

[Common Pleas Court of Hamilton County.]

THE MILLER, DUBRUL & PETERS MANUFACTURING CO. v. THE
LAIDLAW-DUNN-GORDON CO.*

Decided, December 11, 1905.

*Organizations Composed of Corporations, Firms and Individuals—
Not for Profit but for Mutual Protection—Delegated Powers not
Surrendered, When—Attributes of Co-Partnership—Things not
Ultra Vires—Mutual Agency—Executed Contracts—Member of Or-
ganization Liable for Assessment to Pay Running Expenses.*

1. Organizations may have the attributes of a co-partnership, and as against creditors those so associated are generally regarded as partners under the doctrine of estoppel; but as between parties there can be no partnership unless one was intended.
2. A voluntary association composed of corporations, firms and individuals, formed not for profit, but for the "mutual protection of its members and their employes by a uniform basis of just and equitable dealings between them and for the investigation and amicable adjustment of their difficulties," is not as between such members a partnership. Nor is the accomplishment of its objects, as indicated by its preamble, such as would apparently amount to a surrender or delegation of the powers of the board of directors of the corporate members thereof. An organization formed to carry out such objects in good faith is not an illegal enterprise, in which corporations can not join; and an assessment to pay its running expenses levied by agreement upon its members in the ratio of the number of operatives employed by each, is valid.

PFLEGER, J.

Heard on demurrer to the petition.

The plaintiff, a corporation, on behalf of itself and others, members of the National Metal Trades Association, a voluntary association consisting of itself and many other individuals, partnerships and corporations, who are too numerous to bring before the court, says that in December, 1899, the defendant com-

*No appeal taken.

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pany, together with other persons, firms and corporations, to protect their mutual interests, formed an association known as the National Metal Trades Association, and adopted a constitution and by-laws, whereby the objects of said association were declared to be as follows:

1. The adoption of a uniform basis of just and equitable dealings between the members and their employes, whereby the interests of both will be properly protected.

2. The investigation and adjustment by proper officers of the association of any question arising between members and their employes.

The petition alleges that, although the defendant was not present at the first meeting, it afterwards, in March, 1900, made application to join said association, was elected to membership and subscribed to said constitution and by-laws; that thereafter it participated in the deliberations of the meetings, and became obligated under such by-laws to pay certain dues and assessments, as revenues to carry on said association; that assessments were made upon the members upon the basis of the number of operatives employed by each; that certain assessments were paid by the defendant, and that others regularly assessed against said defendant were not paid, although it accepted the benefits of the association; and that there is due on said unpaid assessments the sum of \$590.80, with interest on various items, for which the plaintiff prays judgment.

To this petition a general demurrer was filed by the defendant, on the ground that the petition did not contain facts sufficient to constitute a cause of action.

Briefly, the defendant claims that an Ohio corporation can not become a member of such a mutual association, because it is *ultra vires*.

The demurrer admits the truthfulness of the allegations made, and only such inferences of invalidity or illegality as the admitted facts fairly warrant. No question is raised regarding the right of the plaintiff to sue for itself and others. The defendant urges that inasmuch as both parties hereto are Ohio corporations neither one could be a member of this association; that this

association is in fact a partnership, and if indeed it is not a legal partnership, it is an organization of which a corporation could not become a member, and that no liability accrued by reason of such membership in any amount which could be fixed by the board of administrative council of said association. On the other hand, it is urged that the association is not a partnership, and if it were, then, as between the parties, courts will not excuse participants from paying their share of any liability, and mainly because the contract being executed, the doctrine of *ultra vires* can not be plead to evade such liability.

That a corporation can not become a member of a partnership is conceded as having been settled elsewhere, as well as in our state, by several recent decisions. It is claimed that the association is a partnership because it was created by contract; that it has a capital stock, to-wit, a reserve fund, and that it proposes to control its members in the adjustment of difficulties arising between such members and their employes. That these are some of the usual attributes of a partnership is true, but that they are decisive tests of a legal partnership does not follow. Organizations not for profit are created by contract, usually have a reserve fund and control its members, and yet these are not partnerships. Some authorities hold that the main characteristic of a partnership is the sharing of some mutual gain or profit (Lindlay on Partnership, p. 1) or of profit and loss (Clark & Marshall on Private Corporations, Section 185c). To this characteristic is added that of mutual agency as a result of such community of interest by the Supreme Court of the United States (*Karrick v. Hannaman*, 168 U. S., 328-334). Lindlay excludes from this operation societies and clubs, the objects of which are not to share profits, but to afford mutual protection (Lindlay on Partnership, Section V, p. 120). It is said with some force that protection, while it may be a benefit, does not prove that it is the gain or profit contemplated by the authorities. And it is said as a general rule that as to third persons certain conduct often estops participants from denying that a partnership exists, but that as between parties there can be no partnership unless one is intended (*London Assurance Co. v. Drennan*, 116 U. S., 461).

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Plaintiff forcibly argues that it does not appear from the petition that the organization employs a capital for the purpose of gain or profit; that there is a mutual agency between its members, and that it was so intended between such members.

“The true principle is, and upon this view the apparent discordance in the cases may be nearly reconciled, that the law allows societies to imitate the organization and methods of corporations so far as their rights between themselves are involved, and will enforce their articles of agreements (nothing illegal or unconstitutional appearing) as between the parties to them, but the public and the creditors have a right to invoke the application of the law of partnership to the dealings of any trading association, unless such an association has the shield of incorporation.” Abbott’s Digest of Corporations, under the title “Association.”

Defendant’s counsel concedes that this Metal Trades Association is not an organization for money profit, but that it falls within the definition of a copartnership to “further its enterprise,” as indicated by Morawetz on Private Corporations, Section 220. By this is evidently meant organizations having the salient features of a partnership but organized for the purpose of furthering the enterprise of the corporation. The court is of the opinion that the allegations of the petition do not indicate this mutual association to be a copartnership.

Defendant’s counsel insists, however, that whether legally a copartnership or not, the organization was permitted to adopt for its members a uniform basis for just and equitable dealings between them and their employes, and to investigate and adjust questions arising between them.

The Standard Oil case, in 49 O. S., 127, 185, is referred to. In that case the entire control of various corporations was given by the directors to certain trustees, who were empowered to select directors, all of which were acts inconsistent with the character of a corporation and against the interests of the stockholders. But the principle there stated, that the directors of a corporation could not delegate their powers to others, so that the corporation would be controlled not by its officers, but by outsiders, was reiterated in *Bank v. Wehrmann*, 69 O. S., 160, in

Geurick v. Alcott, 66 O. S., 94, and in *Clark & Marshall on Private Corporations*, Section 185. It must follow that, no matter what the organization is in fact, whether a copartnership or a voluntary society, if its purpose be to surrender to outsiders the powers which strictly belong to the directors of a corporation, such corporation can not legally become a member of such organization. There are, however, many things which a corporation may share jointly with others without making such organization a partnership or inconsistent with the objects of a corporation.

Corporations, it has been held, may combine stock and work for a product to be divided between them and not for sale, as where each party is to keep and use the share that belongs to it (*Parsons on Partnership*, 4th Ed., Section 61). Mere community of interest as joint owners or tenants in common, where none of the parties acting alone can transfer or dispose of the entire property, or act for all others, can not constitute the parties copartners to each other (*Clark & Marshall on P. C.*, Section 185d-4, and cases there cited). Suppose these corporations, in the interest of economy, jointly paid an organization of merchants police or watchmen to protect their properties from fire, or patronized a mutual credit association, through which the financial ratings of customers might be profitably obtained; or they paid a board of trade organization for the privilege of having its officers meet at a designated place to exchange business, it could hardly be claimed that these acts were *ultra vires*. Neither could this be claimed for an organization of lawyers, or experienced men of business, who were paid outright sums of money as compensation for amicably adjusting the difficulties corporations might have with their employees.

Let us further assume that, instead of paying any of these organizations a stipulated amount of money, a number of such corporations secured an organization, not for the purpose of profit, but to economize and to reduce the expense of obtaining the benefit of any such service, and to meet the actual cost of maintenance, in lieu of an arbitrary sum of money, determined to divide the cost thereof by the amount of capital invested by

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each corporation, or by the number of square feet occupied by their respective plants, or, as in the case at bar, by the number of employees employed by each corporation, would this be an organization for profit, or would participation therein endanger the rights of the stockholders, or take away the power of a board of directors, any more than the payment of a fixed sum of money which was formerly obtained for the same service? If the objects of this National Metal Trades Association are faithfully set forth in its preamble, there is nothing apparent which points to any illegal feature, but, to the contrary, it has the commendable purpose of protecting both labor and capital and adjusting amicably their many differences.

An organization called the Missouri Bottlers' Association, the object being to secure the return of certain bottles used in their trade, and to protect the property and interests of its members against illegal traffic in such bottles or property, was held to be a legal body, with power to assess its members, and such an assessment to provide for fees and dues was held valid. *Missouri Bottlers' Association v. Finnerty*, 81 Mo. App., 525.

A similar organization for mutual protection and assessment of members was upheld in *Burke v. Lathrop*, 52 Mich., 106, and also in *Brown v. Stoerkel*, 74 Mich., 269. *White v. Brownell*, 4 Abbott Practice Rep. (N. S.), 162, had under review the liability of members of an open board of trade of stock brokers, and this was held to be not a partnership, but a legal organization.

It is not apparent from the allegations in the petition that the adoption of means used to protect the interests of employer and employe and the adjustment of their difficulties is compulsory if it were assumed that such participation in the association would in fact be a delegation of power which the directors of a corporation must retain. Whatever criticism might be made of the unreported decision of the Supreme Court in the Standard Wagon Co. case, it is plain to be seen that, notwithstanding the firm adherence of the Supreme Court to the principle that a corporation can not become a member of a partnership (*Genrick v. Alcott*, *supra*; *Bank v. Wehrmann*, *supra*), it held in the last

case that a national bank having purchased an interest in a partnership dealing in real estate, was liable, not as a partner, but as a part owner of the property of the syndicate for its share of the expense of purchasing, managing, improving and disposing of the property.

I am not forgetful of the fact that in these cases creditors were pursuing their rights. Much could be said in favor of the argument that the contract being executed on one side, a corporation having received the benefits of such contract, can not plead *ultra vires* to defeat a recovery. It is unnecessary to decide that question at this time. Irrespective of this, however, the court is of the opinion that the National Metal Trades Association, as alleged in the pleading, is not a copartnership, nor an organization for profit, and that membership therein by a corporation is not inconsistent with the character of the corporation, nor is there a delegation of powers from the directors which they are bound in law to retain; and that the amount sued upon, assessed in the manner in which it was, is but a just recompense for a legal service already performed.

The court has been much aided by the arguments and briefs filed by counsel on both sides, which are characteristic of their industry and ability. The demurrer will be overruled.

Frank W. Cottle and Ernst, Cassatt & McDougall, for the demurrer.

Anthony B. Dunlap, contra.

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INCORPORATION OF VILLAGES.

[Common Pleas Court of Butler County.]

JOHN SCHORR AND C. G. MOTZER V. JOHN C. BRAUN, COUNTY
RECORDER OF BUTLER COUNTY, OHIO.*

Decided, November 28, 1906.

*Villages—Incorporation of—Character of Map which Must be Filed
with the Application—Jurisdiction of Township Trustees—And of
County Commissioners—Sections 1536-8, 1536-15 and 1553.*

1. The map which accompanies a petition for the incorporation of a village, whether filed with the county commissioners or township trustees, complies with the requirements of the statute if it accurately exhibits the territory affected and the lines bounding and dividing the properties therein, notwithstanding it does not show that the entire territory has been platted into lots.
2. If the county commissioners have power to act upon such a petition, the township trustees are without power; and when a portion of the territory included within the proposed corporation has theretofore been platted, its incorporation must be effected by the county commissioners under the provisions of Section 1553, and action by township trustees in that behalf is without authority and void.

KYLE, J.

A petition was filed with the trustees of Fairfield township, Butler county, signed by 104 persons, asking that certain territory become an incorporated village under the name of the Village of Lindenwald. It is conceded by counsel for plaintiffs that the petitioners were electors within the territory described and that a majority of them are freeholders.

The territory described in the petition comprises a large number of subdivisions that had been platted into lots, and the plats acknowledged and recorded in the recorder's office of Butler county, long prior to the filing of such petition with the trustees. In addition to such subdivisions there was included within the territory described in the petition, and adjacent thereto, a large number of tracts of land, ranging in size from a fraction of an acre to about twenty acres. The entire territory described

* Affirmed by the circuit court without report, December 15, 1906.

in the petition was approximately about 1,000 acres. The acreage in the tracts of land not platted amounted to approximately ninety acres.

The petition contained all the requirements of Section 1536-8 (1555) and a request of the petitioners that an election be held as provided in 1536-15 (1561a). Such petition was accompanied by a map of the territory which accurately and correctly set forth all the subdivisions theretofore platted and recorded, and the several acreage tracts included in said territory.

There is no contention but that the steps taken by the trustees under Section 1536-16 (1561b) and Section 1536-17 (1561c) were in accordance with the provisions of such sections, and that an election was duly had, at which election a majority of the ballots cast were in favor of the incorporation, and that the acts and records of the trustees were duly certified and transmitted to the county recorder of Butler county for record within the time prescribed under Section 1535-17.

The plaintiffs, two electors within such territory, filed their petition in this action to enjoin the recorder from recording such act, or certifying the same to the secretary of state, and if the same had been done, praying for mandatory injunction and order directing such recorder to cancel said record and proceedings. Two principal grounds are relied on by the plaintiffs:

First. Because the trustees were without jurisdiction and power to act.

Second. Because the petition was not accompanied by an accurate map, and that said map was inaccurate, indefinite and erroneous, and failed to set out that the acreage tracts were divided into inlots.

The granting an injunction is the issuance of an extraordinary writ, and there is no evidence or facts before the court to warrant a finding, if the proceedings were otherwise regular and proper, that the granting of the prayer of the petition for the establishment of a village within the territory named would be either unjust or inequitable.

The claim is made by the plaintiffs that the map was inaccurate because the entire tract included in the territory described in the petition of the petitioners for the incorporation was not laid out in inlots. Such a claim should rather be that

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the map was insufficient. The requirement of the statute is that the petition should be accompanied by "an accurate map of the territory." This is all that is required, whether a petition be presented to the commissioners or the trustees. There is no dispute but that the map accompanying the petition in this case was accurate and set forth all the established lines within the territory. The plaintiffs in their argument assume that the map required to accompany a petition for incorporation must show that the entire tract within the territory was platted off into lots. Under the language of the statute which only requires an accurate map of the territory, the one filed herein being admitted to be accurate, and set forth all the lines and divisions of the properties therein, is sufficient.

The only remaining question is: Had the trustees the jurisdiction and power to act?

Under Section 1536-6 (1553): First, the inhabitants of any territory laid off into a village or hamlet lots and platted, all of which territory has been acknowledged and recorded as is provided with respect to deeds; second, the inhabitants of any territory which has been laid off into city lots and surveyed and platted by the engineer or surveyor, who certifies thereon under oath to its correctness, and which is recorded as is provided with respect to deeds; third, and the inhabitants of any island or adjacent islands, or a part thereof, or all such island or islands, or a part thereof and adjacent territory may obtain the organization of a village or hamlet in the manner provided in this title. Such application shall be signed by not less than thirty electors residing within the proposed corporation limits, and addressed to the county commissioners.

Under Section 1536-8 (1555) the petition shall contain the following matters:

1st. An accurate description of the territory embraced within the proposed incorporation, and it may contain adjacent territory not laid off into lots.

2d. The supposed number of inhabitants residing in the proposed corporation.

3d. Whether the corporation desired is a village or hamlet.

4th. The name proposed.

5th. The name of some person to act as agent for the petitioners, and more than one agent may be named therein.

On the filing of such petition the commissioners give due notice, and if the commissioners find that the petition contains all the matters required, and that its statements are true, they shall cause an order to be entered on their journal to the effect that the corporation be organized, which proceeding shall be duly certified by the recorder for record as provided by law.

The petition in this case was filed under Section 1536-15 (1561a) with the township trustees and proceeded with under -15, -16, -17 (a, b, c) of such section. Under Section 1536-15 (1561a) when the inhabitants of any territory or any portion thereof desire that such territory shall be incorporated into a village or hamlet they shall make application to the trustees of the township in which the territory is located, by a petition signed by at least thirty electors thereof, a majority of whom should be freeholders, and the petition shall contain the request of the petitioners that an election be held to obtain the sense of the electors upon such incorporation.

And the question here directly presented is: Is there any line of distinction to be drawn between the cases which may be brought before the county commissioners and the township trustees for incorporation of villages? A petition may be filed by not less than thirty electors, residing within the proposed corporate limits with the county commissioners. A petition filed with the trustees shall contain all the requirements of the petition before the commissioners (Section 1536-8), and further requires that a majority of petitioners shall be freeholders, and also a request of the petitioners that an election be held to obtain the sense of the electors upon such incorporation. In a proceeding before the county commissioners, the county commissioners become a tribunal or court to hear the petition and determine whether or not the prayer of the petition shall be granted. In a proceeding before the trustees, the trustees themselves do not determine, but hold an election, and the electors within the prescribed territory determine whether or not there shall be an incorporation. When the findings and papers have been certified by the commissioners to the recorder, he can not record the same for a period of sixty days. In a case before the trustees, when

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their findings and the papers have been filed with the recorder, he shall forthwith make a record and the corporation established a village, unless a suit be instituted within ten days from the filing of the papers with the recorder.

Under the law as it now stands the commissioners are without authority or power to establish a village, unless prior to the filing of such petition all, or a part of, the territory has been platted and acknowledged and recorded or laid off into lots by an engineer, or the proceeding affects an island. The claim is made by the defendants that the trustees may establish a village from *any* territory, whether laid out into lots or not.

The only decision upon the question involved in this branch of the case is the case of *Hall v. Siegrist*, 13 O. D., 46, and in that case the point involved herein is directly determined. Judge Neff in that case held:

“Section 1561a, Revised Statutes, *et seq.* (O. L., 333), entitled, ‘To permit the incorporation of territory within a township,’ has reference to the organization and incorporation of a new class of territory within a township, not embraced within Section 1553, Revised Statutes, *et seq.*, providing for the creation of villages and hamlets.”

Without reviewing the authorities referred to, I will follow that decision, as it appears to be the only view that gives full effect to all the sections.

In this case it is admitted that the greater portion of the territory included in the incorporation had long before been platted. This case is thus brought within one of those provided for before the county commissioners, and that, too, whether the territory included only one or a number of plats. If the county commissioners had power to act, the trustees were without power, and, holding these views, I find that the proceedings of the trustees and all their acts under the petition for incorporation are without authority and invalid, and that the record of the proceedings by the recorder should be canceled and set aside, and held for naught, and that an order may be issued accordingly. The costs will be adjudged against the agents named.

W. C. Shepherd, for plaintiffs.

E. H. Jones and Homer Gard, for defendants.

GUARDIAN FOR CHILD OF DIVORCED COUPLE.

JAY A. HARE v. MARY A. SEARS, AS GUARDIAN.

[Common Pleas Court of Wyandot County.]

Decided, January Term, 1906.

Guardian and Ward—Jurisdiction—Necessity for Appointment of Guardian—Final Order—Parent and Child—Order Giving Custody of Child to Divorced Mother—Annulled by Death of the Mother.

1. An order of the probate court appointing a stranger guardian of a minor child is a final order affecting a substantial right of its father and is reviewable on error.
2. The father is by law and nature the guardian of his minor child, and the necessity for the appointment of a guardian does not arise except for cause.
3. Where cause exists for the appointment of a guardian for a minor child, it must be shown that the father is an unsuitable person before another can be appointed.

DUNCAN, J.

This case is here on error from the probate court of this county. The controversy arises over the appointment of a guardian for the person and estate of one Mary E. Hare, a minor.

The said Mary E. Hare is the daughter of plaintiff in error and his wife, Harriet E. Hare, sister of defendant in error, and at the commencement of proceedings in the court below was fourteen years of age. Her father and mother were divorced by decree of court about ten years ago, and her custody was awarded her mother with whom and her grandmother and said aunt has ever since lived and made her home until during the fall of last year when her mother died. Ever since the death of her mother said child has lived and made her home with her grandmother and said aunt as before, who have done everything for her due a child left an orphan at such tender years.

On the 14th day of December, after the death of the mother, plaintiff in error made application to said probate court to be appointed guardian of his said child, and on the next day defendant in error also made application to said court to be ap-

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pointed such guardian. At the same time said child also asked said court that her said aunt be so appointed.

Upon hearing, the court denied the application of plaintiff in error, and granted the application of defendant in error, and appointed her such guardian, and she thereupon gave bond and qualified accordingly. It is to reverse said order of appointment that this proceeding in error is prosecuted.

It is claimed by counsel for defendant in error that because the probate court, under Sections 524 and 6254, Revised Statutes, has not only original but exclusive jurisdiction in the appointment of guardians for minors, that the proceedings of the probate court in that behalf are not subject to review. This is good argument as against the "appeal" of a case where the statute does not provide specifically for the appeal. Otherwise, the jurisdiction would not be exclusive. But review on error is not exercising jurisdiction on appointment. Section 6708, Revised Statutes, provides that any "judgment rendered or final order made by a probate court * * * may be reversed, vacated or modified by the court of common pleas." There was an order made, and made by the probate court, and made dismissing the application of plaintiff in error and appointing the defendant in error guardian of the person and estate of the minor child of plaintiff in error. A final order is defined by Section 6707, Revised Statutes, as "an order affecting a substantial right made in a special proceeding." A substantial right is such right as may be enforced and protected by law (*Armstrong, Recr., v. Brewing Co.*, 53 O. S., 467). And as a final order respecting the custody of children in a divorce suit may be reviewed on error without special statute (*Neil v. Neil*, 38 O. S., 558), it follows that an order affecting the final disposition of children in the appointment of a guardian of their person and estate, is also a final order affecting a substantial right of the person otherwise entitled to their control. It is a special proceeding because it seeks a remedy not by action but by original application for order of court (*Missionary Society v. Ely et al.*, 56 O. S., 405). I hold, therefore, that this court has jurisdiction of this proceeding.

There are but three errors complained of as intervening in the probate court:

1st. That there was no finding that the father was an unsuitable person for such appointment.

2d. That the findings are not supported by the evidence and are against the weight of the evidence.

3d. That the court erred in the admission and rejection of evidence.

The view which I take of the first makes it unnecessary for me to discuss the other two.

It may be conceded that the father is not only by nature but by law the guardian of the person of his minor child, and by virtue thereof entitled to its custody. The fact that the custody of said child by decree of the divorce court was taken away from the father and given to the mother, no longer controls, as the mother has since deceased and that order has thereby become nugatory. *In re Coons*, 20 O. C., 47.

The father, both by law and by nature, being the guardian of his minor child and entitled to its custody, the necessity for the appointment of a guardian does not arise except for cause. The power of appointment is conferred upon the probate court to be exercised only when necessary. Section 6254, Revised Statutes; Rockel's Probate Practice, Section 1312.

Section 6255, Revised Statutes, sets forth the conditions under which the necessity may be said to arise, viz.:

1. That the minor has an estate. And in such case the appointment is limited to the estate only, except where one or more of the other three conditions exist.

2. The death of both parents.

3. The parents becoming unsuitable, or

4. The liability of the parents' interests, in the opinion of the court, being promoted by the appointment.

While Section 6257, Revised Statutes, provides that any "female infant over the age of twelve years, shall have the right to select a guardian, who, if a suitable person, shall be appointed," this right does not arise where the necessity for the appointment of a guardian does not exist (Rockel, Sections 1329-1330). The necessity is a condition precedent and the right to select, a mere incident. Otherwise the power of the probate court could be invoked for the appointment of a guardian for herself

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by the mere whim of any female over twelve years of age, regardless of any necessity or any good reason therefor. The right only becomes absolute when the conditions arise for its exercise. If this construction is not correct, the statute is imperative upon the probate court, the only limitation being that the person selected is a suitable person to undertake the trust. This, certainly, is not the meaning of the statute and its absurdity will appeal to any one when the principle is applied to most any given case where the parent has not become unsuitable.

Take your own case, or take my case: Granted that I am a suitable person to have the custody and tuition of my daughter, now coming to the age of fourteen years, can it be said that she can invoke the jurisdiction of the probate court of my county and by her selection have my neighbor appointed her guardian just because she wants him, and he is a suitable person to act? I think not. But suppose I am not a suitable person, nor my wife, then upon such finding the court may appoint such guardian and shall appoint the choice of the daughter. if that choice is suitable. Here is the dividing line. It defines the limitations of the court's jurisdiction, where, as in this case, it is sought to have the custody and tuition of the child go with the appointment. This is made quite clear by Section 6264, Revised Statutes, which provides that even where a guardian has been appointed for both the person and estate of the minor, "the father of such minor, or if there be no father, the mother, if suitable person, respectively, shall have the custody of the person and the control of the education of such minor."

Reading all these sections of the statute together in an endeavor to give force and effect to every provision in the various situations arising in their administration, and to make the same one harmonious whole, I am unable to come to any other conclusion than the one which I have here announced. I have read the very able opinion of Judge Brown of the probate court and I agree with him in the considerations moving the appointment of defendant in error, and would affirm his order in so doing had he found the jurisdictional fact allowing him to make an appointment of a guardian of the person of said minor.

I agree with the contention made that it is the best interests of the child that prompts the court to act, and in acting, that all other considerations must yield, but in the absence of a finding to the contrary, which I have already explained, the law presumes that the child of his own flesh and blood, born subject to his custody and control, will be more apt to receive that kindly care and protection from the father during its tender years than any stranger would be expected to bestow; and unless it otherwise appears, it must also be presumed that the plaintiff in error possesses that same love and affection and will bestow upon his child such care and protection as would naturally and ordinarily be expected from any father to his daughter under the same or similar circumstances and conditions, aside from any ill will which may exist between the father and the mother's people. This may be said to be the general law of the land. *Weir v. Marley*, 6 L. R. A., 672; *Clark v. Bayer*, 32 O. S., 299.

And accordingly it has been provided by our statutes that this presumption must be overcome by proof that the father is unsuitable. This, I say, is the jurisdictional fact wanting in this record by reason of which I hold the appointment made to be void. Partly as authority, but more as tending to show the trend of judicial interpretation of these statutes, I cite: *Boescher v. Boescher*, 7 N. P., 418; *State, ex rel, v. Madden*, 12 O. D., 83.

Holding the views which I have expressed, it follows that said order of the probate court must be reversed and the cause remanded to that court with instructions to inquire into the suitability of plaintiff in error for the appointment which he seeks, and to make a finding in respect thereto before appointing a guardian for said minor. It is further ordered that defendant in error pay the costs of this proceeding.

Carey & Carey and Benj. Meck, for plaintiff in error.

Judge Lanker and D. C. Parker, for defendant in error.

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Merritt et al v. Pritchard.

**EFFECT OF BANKRUPTCY ON LIABILITY OF A SURETY
ON APPEAL BOND.**

[Common Pleas Court of Cuyahoga County.]

D. T. MERRITT ET AL V. T. W. PRITCHARD.

Decided, December, 1906.

Judgment—Definition of—Surety on Appeal Bond—Released by Discharge of Appellant in Bankruptcy—Section 16 of the Bankruptcy Act—Relating to Liability of Co-debtors, Guarantors and Sureties.

1. A judgment is a final determination of the rights of the parties in action. It affirms that a legal duty or liability does or does not exist and can not be granted for any other purpose.
2. Special or qualified judgments, for a particular purpose, are unknown in Ohio.
3. A discharge in bankruptcy, properly plead by a defendant, is an absolute bar to judgment against him, and therefore to a right of action on an appeal bond, where judgment is a condition precedent.

KEELER, J.

On February 11, 1904, the firm of Merritt, Elliott & Co. obtained a judgment in a justice court against T. W. Pritchard.

On the 17th day of February, 1904, the defendant gave an appeal bond signed by one Chas. F. Greenhalgh, who, among other things in said bond, agreed and promised that "*if judgment be adjudged against the defendant on the appeal*" he would satisfy the same, and he also undertook that the defendant would prosecute his appeal to effect. The appeal was perfected on March 9, and on June 4, 1904, the plaintiffs filed their petition asking for judgment. On August 24, 1904, the defendant filed his answer, stating, among other things, that on the 12th day of March, 1904, he filed his petition in bankruptcy in the District Court of the United States for the Northern District of Ohio, complying therein with all the requirements of the National Bankruptcy Act of Congress; that on the same date he was adjudged a bankrupt and that on the

21st day of May, 1904, he received from said court a discharge from all debts and claims, *which were made payable by said act against his estate*, and which existed on the said 12th day of March, 1904, the day on which the petition for adjudication was filed by him. He says further that the claim of the plaintiff *was provable* against his estate in bankruptcy, and was owing to the plaintiff before he filed his petition and was declared a bankrupt, and that said claim was scheduled in time for proof and allowance, and that he was discharged from it.

The plaintiffs, replying, say that the discharge from the obligation sued on does not have the effect of releasing the surety on the appeal bond, and that they are *entitled to judgment*, in spite of his discharge in bankruptcy, so that they can proceed against the surety, who was in no way released from liability to plaintiffs on the bond by reason of his discharge.

Two questions are presented by the pleadings:

1st. Can a judgment be taken in this court against the defendant, he having been discharged from the debt in question by the proceedings in bankruptcy?

2d. Is the surety liable to plaintiffs, notwithstanding the discharge of the defendant?

The sole and only purpose of the judgment sought is to enable the plaintiffs to proceed against the appeal bond.

What is a judgment and what are its consequences? It is the determination of the law pronounced by a competent court, as the result of an action instituted in such court, affirming that, in the matters submitted for its decision, a legal duty or liability does or does not exist—a final determination of the rights of the parties in action. A judgment against the defendant would confer upon the plaintiffs the right to issue execution for its enforcement. There would be an indisputable obligation on the part of the defendant to the plaintiffs, subject to the processes of the court. It would create a lien upon any real estate he might own which would follow the land into the hands of other purchasers and which might be enforced by the seizure and sale of the property subjected to it. It would, furthermore, constitute a vested right of property in the plaintiffs,

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and it might establish either an evidence or a source of title. These are some of the consequences that would flow out of a judgment against the defendant. They are serious and should not be fastened upon him without the clearest legal right. The defendant owes nothing to the plaintiffs. That is virtually conceded, and the court would be obliged, therefore, to find for the defendant—in the absence of a confession of judgment. That would, of course, end the matter, and plaintiffs would be stopped from proceeding further, unless a judgment could be entered for a purpose other than to determine whether a legal liability does or does not exist. I know of no statute or rule of procedure in *Ohio* that permits it. The court could not enter a judgment and then excuse itself for doing so by saying the real object was to hold somebody else. That, it seems to me, would be to make a farce of the law.

On this proposition, however, plaintiffs refer to 130 U. S., 699, and say that such a judgment can be entered *with a perpetual stay of execution* as to the defendant for the purpose *only* of reaching the surety. That was an Illinois case, and first reading of the syllabus would seem to be convincing that plaintiffs' contention is right. But the facts there (116 Ill., 92) were not at all like those here. A verdict was entered April 12, to which a motion for a new trial was filed. On April 22 the defendant filed his petition in bankruptcy, and on May 1 he was adjudged a bankrupt. On May 7 he filed his certificate in the state court, and asked for a stay of the formal entering of judgment on the verdict because he was a bankrupt. The motion was overruled, and appeal was taken to the United States Supreme Court. Verdict had been returned, and the court in entering judgment was not adding any new liability. His bankruptcy had not been pleaded, and was therefore not an issue before verdict. He could not plead it, for it was too late, and bankruptcy not pleaded is no bar (59 N. Y., 239). The only remedy to be had was the one the court granted, to-wit, a stay of execution for the purpose of reaching the bond.

Besides, Justice Gray in the discussion of the case, page 703, says:

“Whether the judgment is defeated by the bankruptcy of the person for whom the obligation is assumed, depends, not upon the provision of the bankruptcy act, but upon the extent of the authority of the state court *under the local law*. There is nothing in the bankruptcy law to prevent the rendering of such a judgment.”

Neither is there any specific authority given by the act that it can be done, nor can such authority be inferred from it. That it can be done in Illinois seems to be the settled practice there, under certain circumstances.

It is upon that theory, I take it, that such a judgment was entered in that case, and I am not prepared to say it could not be done in Ohio under like conditions.

In Massachusetts the question seems to be settled by statute, and 50 N. Y., 593, indicates a like practice in that state. In the case at bar, however, the *debt* was provable in bankruptcy. Defendant was discharged from it; the remedy to enforce its payment was destroyed, and he *pleaded* his discharge while still on the merits of the original action, which is an absolute bar to any judgment against him. 68 Md., 443; 70 Ky., 348.

The second question raised by the pleadings is, therefore, settled, for if there can be no judgment, there can be no right of action against the surety, the judgment being a condition precedent. Plaintiffs insist, however, that the discharge in bankruptcy in no way relieved the surety from liability to them on the bond, and they cite the 40th O. S., 337. One Clarkson obtained his discharge in bankruptcy while a suit against him was on appeal to the court of common pleas (as here). The court says:

“The discharge of Clarkson did not relieve Ferrell (the surety on the appeal bond) from liability on the undertaking for appeal.”

The decision is very brief, not covering over a dozen lines, and I am unable to learn the reasoning of the court. Whether the debtor plead his discharge I can not say. I am inclined to think he did not. In that case it would be true that the

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discharge would not, *of itself*, relieve the surety. But having, as here, plead his release, the surety could not be reached.

Plaintiffs cite Section 16 of the National Bankruptcy Act, as follows:

“The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for a bankrupt, shall not be altered by the discharge of such bankrupt.”

Who is a bankrupt? The National Act defines the word to mean “a person against whom an involuntary petition has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt.” He is not necessarily, as commonly understood, a person who is unable to pay his debts. Under this definition Greenhalgh was at no time a *surety for a bankrupt*, for the defendant was discharged May 21, 1904, and the date of the appeal bond is February 17, 1904, some three months prior. That section, therefore, does not apply to the facts here.

Moreover, Section 16 of the act manifestly refers to co-debtors, guarantors, or sureties for the bankrupt on the same or original debt, the debt on which the release is given by the discharge. 14 Am. Bankruptcy Rep., 20; 131 U. S., 66; Brandenburg on Bankruptcy, 412. Furthermore—

“The question is not (says the court on page 20 of 14 Am. Bk'cy Rep.), whether the discharge of the defendant released the liability of the surety, but whether the discharge *prevented the happening of the contingency* upon which the liability of the surety was to arise. If no judgment can be rendered against the defendant because of the discharge in bankruptcy, then no liability exists on the part of the surety. The discharge of the bankrupt prevents the surety from incurring liability rather than releases him.”

Says Brandenburg, page 415:

“The cases are numerous in which it has been held that if one is bound as surety for another to pay any judgment that may be rendered in a specified action, if the judgment is defeated by the bankruptcy of the person for whom the ob-

ligation is assumed, the surety will be released, for the *obvious* reason that *the event has not happened* (i. e., judgment against defendant) on which the liability of the surety was made to depend. Of this class of obligations are appeal bonds and the like."

Also 70 Ky., 348.

This is, of course, in line with the well established law of suretyship. All defenses available to the principal may, in general, be resorted to in favor of the promisor in suretyship. If the principal has been released, the surety will be released. No promise to pay the debt of another can have any force when the debt of the other is satisfied. It would be unjust to require him to pay it.

Judgment for defendant.

L. J. Grossman, for plaintiffs.

R. H. Lee, for defendant.

WHAT CONSTITUTES TRAFFICKING IN INTOXICATING LIQUOR.

[Common Pleas Court of Franklin County.]

NELLIE LEONARD v. WILLIS G. BOWLAND, TREASURER.

Decided, November, 1906.

Liquor Laws—Tax Assessed under the Aiken Law—Evidence as to Sales—Seller Engaged in the Business, When—Burden of Proof—Distrain for Non-payment—Injunction—98 O. L., 99.

1. Where a liquor tax has been regularly entered by the county auditor, the duplicate becomes by operation of the statute *prima facie* evidence as to the amount and validity of such tax, and the burden is upon the one so assessed of proving that he was not engaged in the liquor business at the time covered by the assessment.
2. A traffic in intoxicating liquors may be carried on without maintaining a bar or keeping a stock of liquor constantly on hand; and one formerly engaged in the business, but who has ostensibly retired therefrom, will be held to be still so engaged, when the evidence shows that four bottles of beer, which were obtained from a saloon at fifteen cents a bottle, were sold for one dollar a bottle at the same place where the seller formerly carried on the business; and a levy on goods and chattels in satisfaction of the tax assessed against such business will be sustained.
3. The fact that no demand was made at the seller's place of business for the payment of said tax becomes immaterial after the parties and the chattels levied on are before the court for a determination of the issues involved.
4. Penalties are assessed by way of punishment and can not be refunded; and the minimum amount collectible in this case is \$392.30, plus four per cent. collection fees and costs by distress and sale.

EVANS, J.

The plaintiff seeks to enjoin the county treasurer from advertising and selling her household goods, levied upon under distraint by said treasurer for non-payment of liquor tax and penalties claimed by defendant to be due from plaintiff.

By cross-petition the defendant prays for an order for leave to sell said chattel property for payment of said liquor tax.

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penalties and costs, and for the vacation of the restraining order.

The principal question here for determination is whether the plaintiff was engaged in the traffic in intoxicating liquors on and subsequent to May 28, 1906, in this city. She claims that she was not so engaged at said time, and, if her contention is true, then she would be entitled to a permanent injunction. On the other hand, if she was engaged in said traffic at said time then her said goods and chattels so levied on would be subject to sale in satisfaction of said tax, penalties and costs. On June 13, 1906, the defendant, as county treasurer, entered upon the tax duplicate against plaintiff the amounts of taxes and assessments and of the non-payment thereof for the liquor tax under the act of March 28, 1906, and that plaintiff was engaged in said traffic at 348 East Mound street, this city, on and subsequent to May 28, 1906.

Plaintiff admits that she was engaged in the traffic in intoxicating liquors at 348 East Mound street from November 1, 1905, to May 28, 1906. She claims that she had paid her liquor tax to May 28th, but that from and after said date she was not engaged in said traffic; that she sold her stock of liquors on May 26, and that the latter part of June she left said place, and about July 1 she stored her goods with the Buckeye Storage Company; that she kept no bar fixtures at said place; that prior to November 1, 1905, she had been in the saloon business elsewhere, where she had and used bar fixtures, but that when she moved to 348 East Mound street she had no use for bar fixtures.

She says that from May 28 to the last of June, when she left said house, she got beer over a back fence from a nearby saloon for herself; that on June 11, she admits that she got four quarts of beer for some visitors; that these visitors, four men, who came together, called for beer; that she told the men she did not keep it, and they asked her if she could get some; that one of the men gave her \$1, which she handed to one of the girls, living there with plaintiff, and that the girl got a quart bottle of beer; that three other bottles were also procured for the men; she says they were not paid for, except the men

before they left threw some money in her lap and that she made no change; that she don't know how much money they threw in her lap. She says that the beer costs fifteen cents a quart bottle.

One of the girls, who says she went after the beer at a saloon near the rear of this house, says she paid fifteen cents a bottle for it, that she got four bottles, and that the men left \$4 for the four bottles; that plaintiff did not offer to give back change to the men, and that nothing was said about change.

The four men aforesaid, who visited said house on the night of June 11, and secured the four bottles of beer, were all inspectors under the state dairy and food commissioner, and had been sent there by said department to seek information if liquors were sold there, and if said place was liable for assessment as a place not on the duplicate, and report the same to the auditor of state. This is a duty devolved upon said department by Section 4364-14a of the Revised Statutes.

Upon the report of said inspectors to the state auditor that plaintiff was liable to such assessment, the auditor of state caused the same to be entered upon the assessment duplicate of said Franklin county against the plaintiff, together with the 20 per cent. penalty provided by said act.

The testimony of all four of said inspectors was adduced on the hearing. Their testimony is in substance, that about 9 o'clock on the night of June 11, 1906, they went to plaintiff's place at 348 East Mound street, this city, and after being admitted, one of the men proposed to buy a bottle of beer; that plaintiff said she did not sell beer, but would send for it, and said that they would have to give her \$1; one of them gave her \$1; all four of the men testify that plaintiff herself went out and presently came in with a bottle of beer; presently another one of the men proposed to get another bottle of beer; that plaintiff went out for it, and one of the men desiring to find out where she got it, as he stated, went along with her; he says as he passed through a rear room he saw three bottles of beer on a table there; that he saw plaintiff get the beer over a fence at a saloon near the rear of this house; the men testify to having purchased from plaintiff four bottles of beer; that

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before they left plaintiff proposed to treat, and one of the men followed her out; that she stepped on a ladder and tapped on the fence, and a man came out and gave her two more bottles, which made six bottles. They said that they asked her how much she wanted for the beer, and that she said \$1 a bottle, and that they paid her \$4 for the four bottles.

It is claimed by plaintiff that the evidence does not prove that plaintiff was at said time engaged in the business of trafficking in intoxicating liquors; that she did not keep liquors in her house, and that the fact that she took money from said men for the beer drank by them showing a profit to her would not, for only one such occasion, prove that she was in the business of trafficking in intoxicating liquors.

Section 4364-16 of the Revised Statutes defines what is meant by the phrase "trafficking in intoxicating liquors," as used in Section 4364-9, Revised Statutes, and provides that such phrase "means the buying or procuring and selling of intoxicating liquors otherwise than upon prescription issued in good faith by reputable physicians in actual practice," etc. So that it does not necessarily mean that to engage in said business one must have and maintain a bar and bar fixtures, nor to have a stock of liquors constantly on hand.

It appears from the evidence that on this one evening the sale of said four bottles of beer, which cost plaintiff but fifteen cents a bottle, resulted in a profit to her of \$3.40. While there is no evidence before the court of sales made by her on any other occasions, yet from the above sales and the profits it can readily be seen that by an arrangement with a nearby saloon a person could carry on this traffic with considerable profit by conveniently providing the stock from such saloon in quantities such as the demands of her trade require.

If this were allowed it would defeat the very purpose of the statutes, and for that reason it is clearly within the definition of the phrase of "trafficking in intoxicating liquors."

The question here for determination is not, as counsel for plaintiff contend, whether one sale alone could constitute such person as engaged in said business. This must be taken in consideration with the evidence that the plaintiff was up to

May 28, by her own admission, engaged in said business at said place. Whether or not the fact that she did not make known her intention to continue said traffic from and after May 28, and by having the same so entered on the tax duplicate, caused the department to send said inspectors to investigate on June 11, does not appear. But she having been openly engaged in said traffic at said place to May 28, after said date, when the act of March 28, 1906, increasing said tax to \$1,000 had gone into operation, an investigation was caused by the auditor of state, which resulted in discovering the plaintiff selling beer at said place, which she procured from a nearby saloon, at a profit of eighty-five cents per bottle to herself.

If the case stood alone on a single sale, with no other circumstances surrounding it, such as above stated, there would be greater difficulty in reaching a conclusion as to whether such sale sufficiently proved that she was engaged in the business of trafficking in intoxicating liquors. But the fact that soon after May 28, the time to which she had paid the tax, and in two weeks thereafter, she is found selling beer in the same place at a profit, would be sufficient in my opinion to bring her within the contemplation of the statute, and the auditor would be justified in placing her on the assessment duplicate.

For this reason I am of the opinion that the cases cited by counsel for plaintiff are not applicable to cases such as disclosed by the facts in this case.

By operation of the statute, on the facts of this case, the burden devolves upon the plaintiff to prove that she was not at said time engaged in said business. Upon the report of said inspectors to the auditor of state, and the auditor of state having caused the assessment to be entered against such person found to be engaged in said business, upon the assessment duplicate of the proper county by the auditor thereof, together with the penalty of twenty per centum, then by operation of Section 1104, Revised Statutes, said duplicate shall be received as *prima facie* evidence on the trial of the amounts and validity of such taxes and assessments, and of the non-payment thereof.

The evidence that she was not engaged in said business, and that she was not continuing the business after said May 28, does not overcome said *prima facie* case.

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The circuit court in *Simpson v. Serviss*, 3 C. C., 433, held that where a person, having made return that his business is confined exclusively to malt or vinous liquors, or both, thereafter, during the assessment year, makes a single sale of any other intoxicating liquors, the assessment upon his business is thereby increased, as provided by Section 5 of said act of May 14, 1886.

The above case is authority, and controls the case at bar so far as a single sale is concerned in connection with the other fact that plaintiff was conducting said business openly at said place shortly before said time in question.

The fact that the defendant made no demand at plaintiff's place of business before making said levy on her said goods and chattels, is not material now in view of the fact that both the parties and the said goods and chattels are before the court in this action for a full determination of the issues between the parties.

Penalties are assessed by way of punishment, and it is held in this state that such can not be refunded (*Simpson v. Serviss*, 3 C. C., 433). The minimum assessment under the act of March 28, 1906, is \$200. No sum less than that can be assessed. The assessment above said sum was refunded on the assessment duplicate.

The full amount assessed, which is required by statute, on the duplicate against plaintiff was \$961.54; the 20 per centum penalty thereon was \$192.30. There was a refunder on the duplicate of the original amount assessed reducing the same to the minimum of \$200; this, together with the penalty of \$192.30, makes \$392.30; to this will be added four per centum collection fees and costs by distress and sale, as provided by Section 4364-12, Revised Statutes, making in all \$430.76, which amount I find the defendant is entitled to recover from the sale of said goods and chattels of the plaintiff so levied on. I find that the sheriff's fee of \$3.00 is included in said item of four per centum.

I am unable to find from the evidence before me what amount is due the said Buckeye Storage Company, or that the defendant is under obligations to account to said company. It seems

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from the evidence that said company has charged the same against the plaintiff, and consequently will be relegated to its lien on said goods for its charges, subject to the lien of defendant for the amount found as aforesaid.

My finding therefore is against the plaintiff, and in favor of the defendant as aforesaid. The temporary restraining order is dissolved, and defendant is granted leave to sell said goods and chattels in satisfaction of the above amount so found, and the costs of this action are adjudged against the plaintiff.

PAROL LEASES AND THE STATUTE OF FRAUDS.

[Common Pleas Court of Cuyahoga County.]

LOUIS DOMINICK V. JAMES KANE AND MOLLE KANE.

Decided, November 24, 1906.

Landlord and Tenant—Forcible Entry and Detainer—Evidence as to Existence of Parol Lease Admissible, When—Possession—Sections 4106, 4112 and 4198.

It being the settled law of this state that a verbal lease for a term not exceeding three years, when accompanied by possession, is taken out of the statute of frauds, it follows that the duration and terms of the parol lease may be shown by evidence of the verbal agreement between the parties.

BEACOM, J.

This is a proceeding in error, seeking to reverse a judgment granted by a justice of the peace in favor of defendants in error herein, in a forcible entry and detainer proceeding. There is no dispute about the facts. In May, 1906, plaintiff in error herein became the tenant of defendant herein, taking possession of and occupying, from that time until the forcible entry and detainer suit was brought in the justice court, a certain dwelling-house in the city of Cleveland. No writings were had between the parties. Whatever their contract was it existed only by parol agreement and the fact of possession by plaintiff in error.

Plaintiff in error sought to show, this proceeding having been brought about six months after their occupancy began, that, before possession of the premises were taken, conversations were had between plaintiff and defendants of such a character that a parol lease for one year was agreed upon. The justice excluded this evidence. It is clear that if this evidence was wrongfully excluded, then such exclusion was prejudicial. If the evidence had been admitted it would have tended to show that the parties had agreed upon a lease for a year and that the proceedings by the landlord in forcible entry and detainer could not be maintained.

Section 4106, Revised Statutes, provides, in substance, that a lease of lands must be signed by the lessor and acknowledged by him and witnessed. Section 4112 excepts from the provisions of Section 4106 leases not exceeding three years, if accompanied by possession.

The statute of frauds, 4198, Revised Statutes, provides, in addition to the provisions of Section 4106, that no interest in real estate can be granted except by writing. If we had only the rule of the statute of frauds, then this provision would determine this present proceeding in favor of defendants in error, but soon after the enactment of the statute of frauds it was declared by the courts that this legislation, intended to prevent fraud, should not be used as an instrument for its perpetration. In pursuance of this principle it was held that where the provisions of a parol lease for a short period did not exist solely in mens minds and memories, but was evidenced by the open and notorious fact of the lessor having been placed in possession, then, in that case, this manifest act of possession was declared to have taken the case out of the statute of frauds. The statute provides absolutely that nothing can be granted except in writing, but the courts early held that this provision did not apply in a case where something had been done of such a character that the party did not rely for evidence of his rights solely upon parol testimony, but did rely partly upon the open and manifest physical act of possession.

Likewise in this state the courts have in clear language held that partial performance may take a case out of the statute

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of frauds, and that delivery of possession on a parol lease not exceeding three years is sufficient for that purpose. This has been held in numerous cases, among others, in 7 O. S., 158. In paragraph 2 of the syllabus, it is said that—

“A parol lease of lands for more than one year but less than three will, by the taking possession under it and the payment of rent according to its terms, be withdrawn wholly from the operation of the statute of frauds.”

We find, then, that although our statutes provide that an interest in real estate can be granted only in writing, and further that it can be granted only in writing signed and acknowledged by the lessor and witnessed, yet that it is settled law in this state that a lease not exceeding three years accompanied by a possession is taken out of the statute of frauds, the possession being deemed, for a lease of short duration, the substantial equivalent in its evidential character of a written instrument. Judge Swan has, on pages 576 and 577 of his Treatise, stated substantially the same thing in this language:

“If a lease is not in writing but a mere verbal contract, it is binding on both parties, provided the tenant took possession under it, precisely as if it was executed according to the prescribed rules of the statute.”

This, then, appears to be the situation herein: If that lease made by word of mouth for a period not exceeding three years is good, it is good because of the existence of the two facts, first, the oral agreement, and second, the taking possession. Those are the facts which establish existence of the right of the tenant to occupancy, and since those are the facts which constitute the foundation of his rights, he must be permitted to introduce evidence of those two facts in order to establish his rights. If, in the language of Judge Swan, “it is binding on both parties precisely as if executed according to the statute,” then the elements, to-wit, the parol agreement and the possession, which together constitute the evidence of a right to enjoyment of possession, can both be shown in a court by evidence exactly as the written instrument might be introduced in evidence, if such instrument existed. If such evidence could not be introduced, we arrive at the absurd position that the law says that the tenant who has possession

under a parol agreement for possession for a period less than three years has a perfectly valid lease, but that, if the landlord brings a proceeding in forcible entry and detainer, the tenant can not be permitted to introduce the only possible evidence of a parol agreement, to-wit, parol evidence. The lease is in theory as good as a written lease, but if the contention of defendant in error herein be true, then the only possible evidence that could exist to substantiate the claim of plaintiff is excluded. That appears to this court to be a reduction to an absurdity. It is the equivalent of saying that a parol contract is perfectly good, but that its provisions must be proved by something other than parol, which is a manifest reduction to an absurdity.

Defendants in error rely upon a case, 2 O. D., 635. That case doubtless does hold to the theory that while such parol evidence might be introduced in a court of equity, it can not be introduced in court of law. What substance can exist in that language this court is unable to see. That decision was made nearly half a century ago by a common pleas court of this state, and is only binding upon this court in so far as its reasoning appeals to the judgment of this court, and its reasoning does not appeal to the judgment of this court in any degree. Moreover, an examination of this case will show that, in order to arrive at the conclusion therein arrived at, the distinguished judge who announced the opinion found it necessary to criticise certain decisions of the Supreme Court and to assert that they had been decided by only two judges and not by a full bench.

Therefore I am of opinion that in a forcible entry and detainer case, and any other kind of a case or proceeding in a court that has jurisdiction of the subject-matter, it is sufficient to show that a lease of lands for a period not exceeding three years, if accompanied by possession, was made without writings but was made by parol, and that the terms of said parol lease may be shown by evidence of the parol agreement of the parties.

Judgment reversed. Defendants in error except

Bemis & Calfee, for plaintiff.

O. W. Broadwell, for defendants.

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ACTION BASED ON FICTITIOUS ENTRIES.

[Common Pleas Court of Licking County.]

GEORGE P. WEBB, RECEIVER OF THE HOMESTEAD BUILDING &
SAVINGS COMPANY, v. A. A. STASEL, RECEIVER OF
THE NEWARK SAVINGS BANK COMPANY.

Decided, October, 1906.

*Banks and Banking—Credit Induced by Fictitious Entries—Dividend
Paid by a Railway Association on the Faith of a False Credit—
Actions—Receivers—Fraud.*

L, as cashier of a bank and treasurer of a building association, credited himself with \$10,000 on the books of the bank and entered a credit for a like amount on the pass-book of the building association. On the faith of this fictitious credit the building association declared and paid a dividend to its stockholders. Subsequently receivers were appointed for both the bank and the building association, and the receiver of the building association sued the receiver of the bank on an account which included this fraudulent credit.

Held: That no cause of action existed for the amount represented by the fictitious entry, and as to that item the petition should be dismissed.

SEWARD, J. (orally).

The petition states the amount of the plaintiff's claims to be \$22,464.83. But the only portion litigated is the sum of \$14,000. This is made up of two items, one of \$10,000 and the other of \$4,000, each of which appears as a credit to James F. Lingafelter, Secretary of the Homestead Building & Savings Company, under different dates.

Some time in 1902, probably in June, the State Bureau of Inspection of Building Associations, having charge of building associations—their inspection—ordered an examination of the Homestead Building & Savings Company. That examination resulted in a finding that there was a shortage of some \$79,000. This was reported, and Mr. Lingafelter, secretary of the company, was notified of the fact. He claimed that the shortage was only apparent; that an examination of the books from the start would bear him out in his claim. It was agreed that an

expert accountant should be employed to go over the books and determine the actual condition of affairs.

Lingafelter, anxious to declare and pay a dividend, proposed to put up \$10,000 out of his own funds, with which to pay a dividend.

As cashier of the bank and secretary of the Homestead Building & Savings Company, he credited himself on the books of the bank with ten thousand dollars, and the treasurer of the building association with a like sum on the pass-book of the association. Neither the \$10,000 nor the \$4,000 was deposited by Lingafelter in the savings bank at the time he credited himself as secretary with these several amounts, nor afterward, for that matter.

The transactions were purely fictitious, with an intent, as the court views it, to deceive the directors of the building association. There was no semblance of good faith on the part of Lingafelter in either of these transactions. There was no cash passed at the bank and no credit asked for by him from the bank. He had been informed that there was a shortage in the building association of a very considerable amount, something like \$79,000. He became intensely interested in keeping this condition from the ears of the public, and especially those who were patrons of the institution of which he was secretary. It was time for the declaration and payment of a dividend. The building association had no surplus earnings out of which a dividend could be declared, much less paid. The stockholders were not entitled to a dividend except out of the net earnings, and there were none; on the contrary, there was a deficit of \$79,000, of which the secretary was then advised. A failure to declare a dividend he knew would result in an exposure of the condition, while the payment of a dividend would allay suspicion, if any existed. To accomplish this purpose, this fictitious credit to himself, without the knowledge or consent of the bank, was made; and the stockholders received a dividend, which, under the circumstances, they were not entitled to, out of the funds of the bank. Each honestly thought that the dividend check received by him represented the earnings of the capital invested by him; but it did not; there were no earnings.

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These two credits of \$4,000 and \$10,000 go to make up the balance, or a part of it, for which this suit is brought. The bank never got the money which these two credits are intended to represent. The \$10,000 transaction occurred, as shown by the pass-book, July 17, 1902; the \$4,000 transaction July 22, 1903, when Mr. Webber informed him of the discovery of another shortage and demanded that he pay it in.

As I have said, and I recur to it again, the inspector found that there was a shortage of \$79,000. He called Mr. Lingafelter's attention to the fact, and Lingafelter insisted that it was only apparent; that a full examination would show that there was no shortage. He wanted to declare a dividend. He was informed by the inspector that he could not. He said that he would pay in the money with which to pay the dividend out of his private funds.

I am not able to understand why such a proposition was entertained by the inspector. Section 3836-18 provides what should be done under such circumstances in the following language:

"Should the inspector find, upon examination, that the affairs of any such association are in an unsound condition, and that the interests of the public demand the dissolution of such association and the winding up of its business, he shall so report to the attorney-general, who shall institute the proper proceedings for that purpose."

That was not done, and, therefore, these proceedings are now before the court.

I am cited to the case of *Bank v. Blakesley*, 42 Ohio State, 645. This is a case where Carlin & Company, a partnership, engaged in a private banking business, issued to Blakesley a certificate of deposit on their bank. They were then insolvent but in good credit when they issued this certificate. They ceased business, and immediately were succeeded by a savings bank, incorporated under the laws of Ohio, doing business in the same building in which Carlin & Company had formerly done business. This certificate issued to Blakesley, who was a minor, was presented at the savings bank, which gave to Blakesley a new certificate on the savings bank, marked the original "canceled" with a stamp of Carlin & Company, and charged to Car-

lin & Company. The members of the old firm were trustees of the new concern. Carlin & Company had some \$84,000 standing to their credit, which was really fictitious and unauthorized. One of the old firm was cashier, one was president and another assistant cashier. This certificate was renewed from time to time and finally was merged in the one in suit. The savings bank refused payment and suit was brought upon the certificate. The Supreme Court held that the plaintiff had a right to recover.

It is claimed by the plaintiff that this case is authority in this case at bar. But, it will be observed that there is quite a distinguishing feature in that case from the case at bar. In that case, the money was received by Carlin & Company; they retained it; the new concern undertook to, and did, pay off and redeem many of the certificates issued by Carlin & Company, and the court holds that the transaction was in effect a payment by the bank to Carlin & Company of the amount of that certificate and a redeposit by Blakesley in the bank. That is the holding of the court and the theory upon which they find for the plaintiff.

In this case the bank received nothing from Lingafelter, as secretary, to induce the credit, and unless the fraudulent act of Lingafelter was the act of the bank it would not bind the bank, without the knowledge or assent of the directors. This credit was fraudulently made by the cashier, who was also secretary of the building association, to pay a pretended dividend to the stockholders, which was not due them. No dividend could be legally declared or paid; and while this amount might have been checked out, the bank was in no way responsible for the misappropriation of this fund.

So I do not think the Blakesley case is in point. Lingafelter was acting in a dual capacity, as secretary of the building association and as cashier of the bank, in this very transaction, and the transaction itself was an attempt to make the bank, of which he was cashier, debtor to the building association, without any consideration moving from the building association to the bank, to create the relation of debtor and creditor.

It is claimed that the building association, upon the faith of this credit, paid out the amount to its stockholders as divi-

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dends. Well, the stockholders were not entitled to a dividend, and each received more than was coming to him in just the amount he received as a dividend. Under what principle of law or equity can he claim that the building association is entitled to recover this amount, that he may ultimately participate in its distribution?

The court has examined all the authorities at hand, and there were a great many of them. Where a bank in good faith advanced money on collateral forwarded to it by the vice-president of another bank, and charged the loans to the latter, its rights are not affected by the fact that the transaction was fraudulent as between the vice-president and the bank which he represented, for the vice-president *had authority* to negotiate the loan, and the validity was not affected by his fraud. Had Mr. Lingafelter, as cashier of the bank, authority to make a loan to himself as secretary, and take no note or other paper as evidence of that indebtedness; simply crediting himself on the books of the bank; had he authority to do that? The court thinks not.

I will read from 139 Mass., 332-35 (I believe this case was not cited), as to the knowledge of Lingafelter, the cashier, being knowledge of the bank, of which he was cashier:

"A shipped a cargo of sugar to B, and gave him authority to sell the same. The bill of lading recited that the shipment was by order of B, and that the sugar was deliverable to his order, and made no mention of any agency. B indorsed the bill of lading, and delivered it to a bank of which he was a director, and pledged the cargo to the bank as security for a loan by the bank to him. This loan was approved by the board of directors, at a meeting at which B was present. *Held*: That B's knowledge of the fraud was not imputable to the bank; and that an action by A against the bank, for the conversion of the sugar, could not be maintained."

The court say, at page 333:

"While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the com-

munication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating."

Suppose that Lingafelter had communicated his design in this matter to the directors of the bank, would anybody suppose that the matter would be consummated or could be consummated? The court thinks not.

Page 335: "The proposition that a director of a corporation acting avowedly for himself, or on behalf of another with whom he is interested in any transaction, can not be treated as the agent of the corporation therein, is well sustained by authority."

This decision cites a number of authorities.

"In some of these cases, weight appears to be given to the fact that the director was not actually present at the meeting when the transaction was concluded, but this can not be of importance. If it were shown that Burgess urged the loan upon the board of directors, and actually voted in favor of it, his associates not seeing fit to intervene or object to this conduct, he would still have acted on his own behalf, and of those whose interests and efforts were of necessity adverse to those of the corporation. To assume that, under such circumstances, the facts he knew were communicated to the directors, and that he laid before them the fraud he was committing in wrongfully pledging property, would be a presumption too violent for belief, and would do great injustice to the remaining directors and the interests they represented."

So the court finds for the defendant, and makes an order dismissing the petition in so far as it is based on these credits. Judgment for the amount admitted to be had. The costs will follow the case.

Kibler & Montgomery, for plaintiff.

Flory & Flory and *A. A. Stasel*, for defendant.

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AUTHORITY TO COMPEL USE OF WATER METERS.

[Common Pleas Court of Cuyahoga County.]

MARGURITTE L. HUTCHINS V. THE CITY OF CLEVELAND.*

Decided, November 24, 1906.

Municipal Corporations—Regulation of Use of Water—Confided in Council Rather than Board of Public Service—Ordinance Providing when Meters Shall be Installed—Injunction by an Objecting Owner.

1. Council is empowered to fix rules and regulations for the use of water by consumers, and such rules having been provided, it is the duty of the board of public service to apply them.
2. But where council has by ordinance authorized the board of public service to meter buildings other than residences at its discretion, and has further declared that "residences shall be metered only on request of the consumer, provided that in case of waste or other improper or unauthorized use of water of which satisfactory proof has been furnished to the meter department, a meter may be set without the consent of the consumer," an injunction will lie on petition of the owner of a residence against the installation of a meter, in the absence of any evidence of waste or other improper use of water.

BEACOM, J.

Plaintiff owns a lot in the city of Cleveland, on which is situated a dwelling-house. The council of said city passed an ordinance providing for the purpose of determining the amount of water used, that the board of public service might, at its discretion, meter buildings other than residences. Said ordinance provided further that "residences shall be metered only on request of the consumer, provided that in case of waste or other improper or unauthorized use of water of which satisfactory proof has been furnished to the meter department, a meter may be set without the consent of the consumer." Plaintiff alleges that the board of public service, defendants herein, are about to install a water meter upon

* For contrary holding as to the power of council, see *Hutchins v. City of Cleveland*, 9 C. C. - N. S., 226.

her premises without her consent and against her will, and she further alleges that she has not wasted water or made any improper or unauthorized use of the same, and that no proof of any kind of such waste or improper or unauthorized use of water has been furnished to the meter department. She further alleges that the defendants are without authority to install a meter upon her premises against her consent, and she asks that the court enjoin them from so doing.

To this petition a demurrer is filed, and it is conceded that the only question for the court to determine is whether or not the board of public service, defendants herein, have power to install water meters except as authorized by ordinance of the council. In other words, the question is whether or not the council and the council alone can provide rules and regulations as to when and where meters shall be installed, or does the board of public service have that power. The defendants found their claim to this power upon the provision of Section 1536-522, Revised Statutes, in which it is provided that "for the purpose of paying the expenses of conducting and managing the water works the trustees or board shall have the power to assess and collect from time to time a water rent in such manner as they may deem most advisable." Defendants say in their brief in pursuance of this claim that "the board of public service has the right to determine how it will assess water rents; that the installation of water meters is a mere mechanical device for the assessment and ascertainment of water rents; that the discretion of the board of public service with regard to such services can not be controlled by the council." This is the claim of defendants.

The court will not consider the question of whether or not the powers granted to boards of water works trustees by former Section 2411 are now vested in the board of public service. In the view the court takes of this matter it is unnecessary to examine into that question, and it is sufficient to say that it is of opinion that the question can be determined by other provisions of the statutes that are less subtle and refined than the construction sought to be made of this section by counsel for defendants.

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Section 1526-131 provides, among other things that: "In all municipal corporations council shall have the care, supervision and control of aqueducts."

Section 1536-675 provides that the directors of public service "shall be the chief administrative authority of the city, and shall manage and supervise all public works," etc.; and the following section provides that the directors of public service "shall supervise the improvement and repair of aqueducts and the construction of all public improvements;" and the next section provides that the directors of public service "shall have the management of all municipal water," etc.

The word aqueduct is doubtless used in the sense of the Latin word from which it is derived, and is intended to include all those means by which water is led from a source of supply to the user, and it is substantially equivalent to "water works." The court is of opinion that the control given to the council, the legislative body of the city, includes the power to make rules and regulations for the use of water by consumers, and that, when it passed the ordinance providing where and when water meters should be installed, it was exercising a power which the statutes of the state had given to it; that this power was a legislative power, and properly exercised by the council and could not be exercised by any other public officers.

The court is further of opinion that the board of public service, who are by the statutes "the chief administrative authority," have the power to "supervise improvements to aqueducts," and that that is the extent of their powers in the premises. They apply the rules made by the council to the subject matter, determine the mode and manner in which the work shall be done, but can only do so within the scope of the rules provided by the legislative body, the council.

Believing that such is the relative and respective powers of the council and the board of public service, the demurrer of the defendants is overruled. Defendants except.

W. S. Fitzgerald, for plaintiff.

Baker, Estep, Payer, Wilkins & Carey, City Solicitors, for defendants.

HOLDINGS WITH REFERENCE TO BALLOTS IMPROPERLY MARKED.

[Common Pleas Court of Highland County.]

JAMES A. WILLIAMS v. WILLIAM S. BARKER.

Decided, January, 1907.

Infirmity Director—Contested Election of—How Appeal is Perfected Under Section 2997—Parol Evidence as to Ballots not Counted—Folding and Marking the Ticket—Markings which Might Identify the Ballot Render it Void—Irregular Marking Which does not Render the Ballot Void.

1. In an action to contest an election where the election officers are *functus officio*, the fact that none of the ballots in dispute were counted by the election officers may be established by parol evidence.
2. A ballot is not voted until it is deposited in the ballot box, and hence when a ballot was not deposited in the box because improperly folded, it can not be counted.
3. A ballot which contains a cross in the circle over the Democratic ticket, but is irregular in that it contains a cross before the names of both the Democratic and Republican candidates for judge, should be counted for the Democratic candidates on the ticket other than judge.
4. A ballot that is irregular in that it contains a cross in the circles over both the Democratic and Socialistic tickets, should be counted for the Democratic candidates on the county ticket, where there are no candidates for county offices on the Socialistic ticket.
5. A ballot with a straight mark or a circle within one of the circles over the several tickets does not indicate an honest desire on the part of the voter to comply with the statute in designating the ticket he desires to vote, and such a ballot should be rejected; but where the mark in the circle at the head of a ticket shows only such an irregularity as might result from an awkward use of the pencil, the ballot should be counted.
6. Where all the tickets on a ballot except one are marked off with long cross-marks extending from the top of the ticket to the bottom, and there is no cross in the circle over the ticket which is not thus erased and no crosses opposite the names of the candidates on that ticket, the ballot should be rejected for failure on the part of the voter to exhibit any intention to comply with the statute in the marking of his ballot.

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7. A mutilated ballot should be rejected, for the reason that it would afford a sure means of identifying the ballot, and there is a provision for supplying a voter with a second ballot if the first is spoiled in the marking.
8. In a contested election case, where the term of office has begun before the case is brought to trial, a finding in favor of the contestant should be accompanied by a judgment of ouster and of induction of the contestant into office.

BIGGER, J.

This is a special proceeding under Sections 2997, *et seq.* of Revised Statutes to contest the right of the defendant to the office of infirmary director of Highland county, he having been declared duly elected to that office by the board of deputy state supervisors of elections of Highland county, on the 14th day of November, 1906.

The statute does not provide for any pleadings in such cases, the only requirement being that the contestor shall file a notice of his appeal from the decision of the board with the clerk of the court of common pleas, and give notice thereof in writing to the contestee, which was done in this case. This notice of appeal is in the form of a petition addressed to the court, which states that the relator is an elector of Highland county, and was such at the time of the election on November 6, 1906, and was a candidate and voted for at said election for the office of infirmary director, to which office the contestee was declared to be elected and gives notice that he will contest the election of the said William S. Barker upon the following grounds:

First. That in certain townships in said county at least six votes were legally cast for the said Williams for said office of infirmary director which were not counted for him, but were sealed up and sent to the board of deputy state supervisors of elections of said county who now have them in their possession. Then follows a statement of the townships and the votes claimed to have been cast in each for the relator.

Second. The relator states that the board of deputy state supervisors of elections of Highland county found and declared that the said James A. Williams and William A. Barker at said election each received 3,087 votes, but did not include and count in the vote for said James A. Williams the six votes so as aforesaid cast for him.

Third. The relator further states that the said James A. Williams received at said election a majority of all the lawful votes cast for said office of infirmary director and was and is the duly elected infirmary director of said Highland county.

The relator prays that the finding and declaration of the board of deputy supervisors of elections of Highland county may be reviewed and inquired into and set aside and held for naught, and that the said James A. Williams may be declared to be duly elected to said office, and that the court make such order and decree and award such process as may be proper and necessary in the premises.

The contest is over the validity of these disputed ballots which were sealed up by the election officers in accordance with the statutory requirement and returned to the board of deputy state supervisors of elections. There is some informality and want of compliance with the statute on the part of the election officers in making the return of these ballots, but it is stipulated and agreed between the parties to this contest, that if it is competent to prove this fact by parol evidence, that none of these disputed ballots in question were counted at the election. The election officers are now *functus officio*. That being true that such fact may be established by parol evidence is, I think, established by the authorities. *Phelps v. Schroder*, 26 O. S., 549; *State v. Conser*, 14 C. D., 270; *Sinks v. Reese*, 19 O. S., 306; *Wigmore on Evidence*, Section 1351.

These disputed ballots are eleven in number, marked for identification as Exhibits A, B, C, D, F, G, I, J, K, M and O. Exhibit J is marked in the circle at the head of the Socialist Labor ticket, and as there are no other marks upon the ballot, it can not be counted for either the contestant or contestee and may, therefore, be passed without further notice.

I notice next the ballot marked Exhibit O. The stub still remains upon this ballot and the evidence shows that it was never deposited in the ballot box. As to this ballot, the evidence is substantially this: The voter, James Morgan, whose name appears upon the stub, was an inmate of the county infirmary, and presented himself at the polling place and obtained a ballot from the election officers. He retired to a voting booth and returned

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therefrom with the ballot folded so as to conceal the fac-simile of the signatures of the election board, and with the printed ballot on the outside. He was directed to return to the booth and properly fold his ballot. He re-entered the booth and again returned and presented the ballot improperly folded. The evidence is not very clear as to the number of times he returned to the booths on direction of the election officers, but apparently three times at least. The undisputed evidence is that the last time he presented his ballot to the judge, he was informed that it was not properly folded, and that he thereupon threw it toward the judge saying that he did not have time—one of the judges testifying that he also said he could not fold it right, and went out of the polling place. The witness, Van Zant, one of the judges, testifies that the ballot was properly folded the last time except that the stub was folded in with the ticket with a small corner of the same projecting.

Upon this evidence, I am of opinion this ballot can not be counted. It was the duty of the voter when directed to properly fold his ballot. The stub being folded in with the ticket, would require some one to open the folded ticket to detach the same, and this the election officers had no right to do. But beyond all that the voter did not dispute the statement of the judge that his ballot was improperly folded, but apparently recognizing that fact, desisted from the attempt to vote, saying that he did not have time, and when he returned the ballot to the election officers he did only that which the law required of him in case he did not vote the ballot. Section 2966-37, Revised Statutes.

The voter did not ask the assistance of the election officers in marking his ballot, and the evidence does not show that he was entitled to such assistance. The evidence tends to show he was a man of low mentality, but it is only physical infirmities rendering the elector unable to mark his ballot that entitles him to have the assistance of the election officers under the statute. He marked his ballot but did not properly fold it, and returned it to the election officers without having voted. His statement that he did not have time, and that he could not fold it right shows that he desisted from the attempt to vote.

Furthermore, Section 22 of the act as amended at the last session of the Legislature, provides: "When any person shall

have received an official ballot from one of the election officers and shall have delivered the same to the election officer, having charge of the ballot box at the time, and when such ballot has been deposited in the ballot box, such person shall be deemed to have voted." I conclude, therefore, that this ballot can not be counted.

I next consider the ballots marked B and G, as in my opinion their validity depends upon the same considerations. The ballot marked B contains a cross in the circle at the head of the Democratic ticket, and also a cross at the left and opposite the name of Oliver Newton Sams, the Democratic candidate for common pleas judge, and also at the left of and opposite the name of Cyrus Newby, the Republican candidate for common pleas judge. There are no other marks upon the ballot.

The ballot marked G for identification, contains a cross-mark in the circle at the head of the Democratic ticket and also a cross-mark in the circle at the head of the Socialist ticket. These are the only marks upon the ticket. Upon the Socialist ticket there is a full list of candidates for state offices and a candidate for Congress, but no candidates for county offices.

In my opinion these two ballots must be counted for the contestant. Our statute provides Section 2966-35, that "If the elector mark more names than there are persons to be elected to an office * * * his ballot shall not be counted for such office." In the ballot marked B the elector voted for more names than there were persons to be elected for the office of common pleas judge. In the ballot marked G, the voter voted for more names than there were persons to be elected for each state office and for Representative in Congress. The cross in the circle was a vote for every candidate appearing on that ticket. But the statute in such case provides that such ballot shall only be rejected as to that office, and this plainly evidences the intention of the Legislature that as to other offices on the ticket it shall be counted. This exact question does not seem to have been decided in this state so far as appears from the reports, but the exact question was decided by the Supreme Court of California under a statute containing the same provision. The California statute provides: "If the voter marks more names than there are persons to be elected to an office, his

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ballot shall not be counted for such office." It will be observed that the language is identical except that the Ohio statute uses the word "elector" where the California statute uses the word "voter."

In the case of *Day v. Dunning*, 127 California, 55, the court decided that—

"Ballots cast for an excessive number of names for one office have only the effect under Section 1211 of the political code to prevent the ballots from being counted for that office, and such excessive number of votes for one office, does not constitute an identifying mark within the meaning of Section 1215 of the same code, and does not destroy the validity of the ballot or effect it in so far as properly cast for candidates for other offices.

"The fact that the vote for an excessive number of names for one office might be used as an identifying mark does not affect the validity of the ballot in respect to other offices, such identifying marks being relieved from the operation of Section 1215 of the political code by virtue of the more specific provision of Section 1211 of that code, which is a limitation upon Section 1215."

The California statute, Section 1215, provides "No voter shall place any mark upon his ballot by which it may afterwards be identified as the one voted by him." In the opinion in the above case it is said:

"Section 1211 by all rules of construction is susceptible of but a single meaning. It means that the ballot must be rejected as to the particular office where more than the number of names allowed by law are voted for that office, and that it must be counted as to all other names for all other offices. This is as plain as though it were declared in direct and positive language. The statute means this or it means nothing."

To the same effect is the decision of the Supreme Court of Indiana, in the case of *Borden v. Williams*, 155 Indiana, 36, and of the Supreme Court of Illinois, in the case of *Parker v. Orr*, 158 Ill., 609. In the case of *Caldwell v. McElvain*, 184 Ill., it was decided that—

"Where two only of the five tickets printed upon the ballot have a candidate for a certain office, a ballot marked with a

cross in the circle at the head of each of such two tickets can not be counted for either candidate. But where the crosses marked are in the circle at the head of one of the tickets having a candidate for such office, and one or more which have not, the ballot may be counted for such candidate."

The voter not having voted for more than one name for the office of infirmary director on either of these ballots, and that name being that of the contestant, James A. Williams, I find that these two ballots should be counted for him.

There are two ballots marked Exhibits C and I, which are marked in the same manner, viz., with a straight mark in the circle at the head of the ticket, the ballot marked for identification C having the straight mark in the circle at the head of the Democratic ticket, and the ballot marked I, having the straight mark in the circle at the head of the Republican ticket. In so far as the result of this contest is concerned, it is immaterial whether these two ballots be counted or not, as one is cast for the contestant and the other for the contestee. Their validity depends upon the construction to be given to our statute. The statute provides that the "elector shall observe the following rules in marking his ballot." Then follow the specific directions for marking a ballot, the requirement being that a cross shall in all cases be used to indicate the voter's intention. Manifestly it was the object and purpose of this requirement that all voters should be required to make the same kind of a mark upon the ballot so as to carry out the purpose and object of securing a secret ballot and to prevent bribery and intimidation. If it is optional with the voter to use some other kind of a mark than a cross-mark, then he may use any mark whatever, so that it be placed in the proper position, and it is manifest that to permit this latitude would result in practice in defeating the primary object of the Australian Ballot Law, which is to secure a secret ballot. It is true our statute contains the provision that no ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice. But clearly this must be construed with the other provisions of the law and construed in the light of the controlling object and purpose of the Australian Ballot Law. If the intent of the voter alone

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is to be the guiding star, then what is there to prevent a voter from writing on his ballot "I desire to vote for every name on the Republican ticket" or "the Democratic ticket." Such a system would clearly defeat the very object and purpose of the law. Is such a mark as this to be regarded as a technical error which is to be disregarded if the intent of the voter can be arrived at? I do not find any reported case in this state involving this question, but it has been before the courts of other states under provisions substantially like our own statute. I find that the Australian Ballot Laws in all the states, so far as I have examined them, contain a provision substantially like our own, that effect is to be given to the intention of the voter where it is possible to arrive at it. The statute of Minnesota provides: "In the counting of ballots cast at any election, all ballots shall be counted for the persons for whom they were intended so far as such intention can be clearly ascertained from the ballot itself." In the case of *Truelsen v. Hugo*, 81 Minn., 73, the Supreme Court of that state decided that "The intention of the voter under our election law must control in counting his ballot; but such intention must be shown and indicated by markings on the official ballot substantially in the manner provided by such law and in *bona fide* attempt at compliance therewith."

In the opinion the court said:

"While the statute is careful in requiring effect to be given the intent of the voter, all the provisions on the subject are pregnant with the idea that such intent must be expressed and indicated by a compliance with the manner and method therein provided for marking the ballots."

The court further said:

"If the intent of the voter is to control regardless of the manner of indicating it, then there need be no attempt to comply with the requirements of the statute at all. Such is contrary to the purpose and intent of the law and we adopt the view that the intent of the voter to be effective must be indicated and expressed substantially in the manner as provided by statute, or at least in a *bona fide* attempt at compliance therewith."

In the case of *Parker v. Orr*, *supra*, the Supreme Court of Illinois decided—

“An honest attempt to follow the directions of the law requiring a cross to be made in the proper margin or place opposite the name on the ballot, must appear in order to permit the ballot to be counted. Writing the word “Democratic” at the head of the ticket, making a single mark through the circle or square, making a circular or other irregular character (not being the form of a cross) within the circle or square, making a cross opposite the names, but outside the square, and signing the name of the voter to the ballot are all modes of marking which disregard the directions of the law, besides destroying the ballot’s secrecy and ballots so marked should be rejected.”

In a case reported in 7th S. D., 343, it was decided by the Supreme Court of that state that—

“A straight or diagonal line at the left of the name of a candidate does not constitute a cross and should be disregarded. One or more circles within the circle at the head of a party ticket do not constitute a cross within the circle and should be disregarded.”

In the opinion the court says:

“The cross is the distinguishing mark in our Australian Ballot System, and we think it would be going too far to hold that a circle could be substituted for the cross prescribed by the statute. It may have been the intention of the voter to substitute a circle for the cross, but the law permits no such substitution. If the voter desired to have his vote counted, he must substantially comply with the law.”

In the case of *Kelly v. The State*, 79 Miss., 168, it was decided that—

“Under code of 1892, Section 3664, providing that the name of the person voted for on a ballot, shall be marked with a cross, the use of two crosses to designate the name of the person voted for does not invalidate the ballot. Under said statute, ballots on which the voter’s choice is sought to be indicated by a straight mark opposite the name or by erasing a name should not be counted. The statute intends a cross only to indicate the choice of the voter.”

The authorities seem to be practically in accord on the proposition that the elector must use a cross to indicate his intention, or at least it must be apparent that he was honestly endeavoring to make the mark which is prescribed by the statute as the

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proper mark to indicate his intention. If we depart from this statutory requirement and hold that some other mark will answer as well, it is difficult if not impossible to prescribe any limits to such departure from the statute. I am therefore compelled to reach the conclusion that these two ballots should not be counted.

The same reasons, it is apparent, will exclude the ballot marked for identification Exhibit D, and which is marked with a circle within the circle at the head of the Republican ticket. This ballot must for the same reasons be rejected.

I next come to the consideration of the ballot marked for identification Exhibit K, which is marked in the circle at the head of the Democratic ticket, and contains no other marks. This mark is something more than a cross. It is composed of three straight marks in one direction and two straight marks at right angles therewith and crossing the three marks. I have reached the conclusion that this ballot must be counted. There is here a cross, but the voter has for some reason repeated the operation. The intention of the voter here is plain, and as he has apparently tried to follow out the statutory requirement with reference to voting a straight ticket, the ballot should be counted as a straight Democratic ballot.

There is no reported case in this state in which this question has been before the courts for decision, but there are a number in other states and the clear weight of authority in such case is that such the ballot must be counted. It is to be remembered that many voters are unused to the use of a pencil and are awkward in its use, that the light is often times dim in the voting booth and that the vision of many voters is poor, so that to require great exactness or nicety in the making of the cross would result in disfranchising honest voters.

In the case of *Parker v. Orr*, *supra*, the Supreme Court of Illinois held that—

“Imperfect success in making the cross in the proper place to indicate a choice of candidates where there was a clear intention to conform to the statute and not to distinguish the ballot will not require its rejection.”

In this case there was more than a cross, there being two marks in one direction and one mark crossing them, and it was held the ballot should be counted.

In the case of *Houston v. Steel*, 98 Ky., 596, it was decided:

“Ballots marked with two or more crosses in one square, or with a cross of a peculiar form, should be counted if otherwise regular as these are not such distinguishing marks as invalidate the ballot in the absence of evidence of intent to distinguish it.” In that case there was one ballot marked with three crosses in the circle, which was regarded apparently as only three attempts to make a cross.”

In *People v. Kamps*, 129 Mich., it was decided that—

“Election ballots which appeared as though the voter had first made a cross in the circle and thinking he had not marked it plainly enough, repeated the marking, substantially over the first, and others which appeared as though the cross might have been made with a pencil, the lead of which was so broken that it had two points on it, or on which the voter may have made a cross with a down and up stroke in making each mark, were properly counted.”

The court in the opinion said that “If these ballots were to be rejected, the ballots of many voters who do not use pen or pencil very often would have to be rejected.” To the same effect are the following cases: *People, ex rel Bantel, v. Morgan*, 20th N. Y. App. Div., 48; *State, ex rel Orr, v. Fawcett*, 17th Wash., 188; *Kelly v. State*, 79 Miss., 159; *Tandey v. Lavery*, 194 Ill., 372.

This ballot being marked in the cross at the head of the Democratic ticket must be counted for the contestant.

This leaves for consideration the ballots marked for identification, Exhibits A, M and F. As to these three ballots I am in doubt. It is immaterial what the decision be, however, as to their validity, as it can not affect the result, even if the one which is claimed for the contestee be counted, Exhibit M, the other two, if counted at all, being Democratic ballots. I am clearly convinced that Exhibits B, G and K must be counted for the contestee under the provisions of our statute and the decisions above cited. I also feel clear that the Exhibits C, D, I and O can not be counted for the reasons stated, which would give to

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the contestee a majority of three votes which can not be affected by the decision as to these three ballots.

Exhibit A contains a cross-mark in the circle at the head of the Democratic ticket, and a cross-mark at the left and in front of the blank space on the Socialist ticket, marked for county commissioner, there being no candidates for county offices on the Socialist ticket. This ballot, to my mind, has all the earmarks of a fraudulent ballot marked for identification. I have much doubt as to whether or not this is a technical error which is to be disregarded under the terms of the statute. The intention may be clear, but it is equally true this ticket is so marked as to readily identify it from other ballots which defeats the object and purpose of the Australian Ballot.

The Supreme Court of Illinois, in the case of *Parker v. Orr*, *supra*, decided that: "The use of a mark furnishing means of avoiding the secrecy of a ballot requires its rejection, though the law contains no direct prohibition of distinguishing marks, and this is so even though the mark used may indicate the voter's candidate or party choice." The statute of Illinois, like our own, contains a provision that where it is impossible to determine the voter's choice, the ballot shall be rejected. For these reasons I think this ballot should be rejected.

As to the ballot marked O, all of the tickets upon the ballot, except the Republican ticket, are marked off with a long cross-mark extending practically from the top to the bottom of the tickets, but no mark of any kind is placed upon the Republican ticket, either in the circle or at the left and before the names of the several candidates thereon.

The Supreme Court of Minnesota, *Truelsen v. Hugo*, 81 Minn., 73, decided that under the Australian Ballot Law such a ballot could not be counted. It was held in that case that—

"The intention of the voter under our election law must control in counting his ballot. But such intention must be shown and indicated by markings on the official ballot substantially in the manner provided by such law and in *bona fide* attempt at compliance therewith."

The court says on page 78—

"Exhibit 34 was properly rejected. There was no attempt at a compliance with the statute on the subject of marking and it

could not properly have been counted. The only marks on this ballot are those erasing the name of contestee, the name of the Socialist Labor candidate, and the names of the Republican and Socialist candidates for Aldermen, leaving the Democratic candidates alone on the ballot, but without any attempt to place a mark of any kind opposite their names."

I therefore reject this ballot as not being a compliance with the law and not indicating the intention of the voter to vote the Republican ticket, he having neither marked his ballot nor attempted to mark it, as required by the statute.

As to the remaining ballot, it is mutilated by an attempted erasure of names on it. This is also rejected. The statute provides for issuing additional ballots in case the voter spoils his ballot and such a marking would be a sure means of identifying the ballot from others.

The result arrived at, therefore, gives to the contestant three votes, which gives him a total vote of 3,090, as against 3,087 for the contestee. I therefore conclude upon the evidence and the law that the contestant received a majority of the legal votes cast for this office and was and is duly elected to the office of infirmary director of Highland county, and such is the judgment of the court.

Furthermore, as under the law the term begins on the first Monday of January, which would be the 7th day of January, and as the Supreme Court has held that this remedy is exclusive and that quo warranto can not be maintained, I am of opinion a judgment of ouster should be entered and of induction of the contestant into the office. The costs under the statute are assessed against the contestee, including the cost of the depositions. Exceptions may be noted by either party.

Steele & Sams, for plaintiff.

Geo. L. Garrett and D. Q. Morrow, for defendant.

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ACTION FOR RECOVERY OF DIVIDEND DECLARED.

[Common Pleas Court of Montgomery County.]

LEE MITCHELL V. THE BOOKWALTER WHEEL COMPANY.*

Decided, 1905.

Corporations—Powers of Boards of Directors—Dividends Declared are a Debt of the Company—Whether Legally Declared is for a Court to Determine—Special Meetings of Directors—Notice of Meeting—Suspensions of Fraud—Sections 3269-1-2-3—Minutes—By-laws.

1. Under the law of Ohio the board of directors of a corporation for profit control, exercise and conduct the business and powers of the corporation.
2. When in the exercise of such authority a dividend is legally declared, it becomes a debt of the company to the stockholder as an individual to be paid within a reasonable time, and as such is beyond the control of both the stockholders and directors.
3. Whether or not the directors have acted within the scope of their powers in such declaration is for a court to determine in a proper case.

SNEDIKER, J.

In this case the jury was waived, and it was by consent of all parties heard by the court. Plaintiff's petition states that the defendant is an Ohio corporation for profit, with a paid up capital stock of seventy-five thousand dollars; that on the 8th day of September, plaintiff was the owner and holder of ninety shares, of one hundred dollars each, and that on said date defendant declared a dividend of forty per cent., whereby plaintiff was entitled to receive the sum of thirty-six hundred dollars; that of that amount he has been paid three thousand dollars, and that there yet remains due him unpaid six hundred dollars, which defendant refuses to pay, and he asks judgment in that amount with interest from January 19, 1903.

Defendant by amended answer admits its incorporation, the ownership by plaintiff of the number of shares claimed of the

* Affirmed by the circuit court without report; affirmed by the Supreme Court without report, January 29, 1907 (76 Ohio State).

value alleged; that plaintiff was paid three thousand dollars; that he has demanded six hundred dollars and has been refused, and denies each and every other allegation in the petition.

As a second defense, defendant denies that there was a meeting of the board of directors on September 8, 1902, denies the declaration of the dividend, and says further that if there was a dividend of forty per cent. lawfully declared, it was understood and agreed, and was a condition of the declaration, that only thirty-three and one-third per cent. of the same should be paid until there should be further action of the board of directors providing for the payment of the other six and two-thirds per cent., such action to be at such future time as the board could find said sum could be paid without embarrassing the corporation; that said time had not arrived when the suit was brought; that the board had so declared, which action of the board was approved by the stockholders, who also declared it was not prudent to pay the additional dividend. Plaintiff has received the same dividend as all of the stockholders.

By way of amendment to the answer, the defendant further says that there was an alleged meeting of the board of directors of the defendant company on the 18th day of September, 1902, at which time there was an attempt made by certain directors, of which the plaintiff was one, to declare a dividend of forty per cent. upon the paid up capital stock of the said company: that the plaintiff, who was the secretary, called the said meeting, knowing that the president of the company was absent from the county and state, although he well knew he would return in time for a meeting at the same time the meeting for a declaration of dividend was held the year before: that the president was not notified in any manner whatsoever of said meeting, neither did the secretary make any attempt to notify him, although the meeting was called as a special meeting—the day of the regular meeting in said month being on the 2d day of September; and the said secretary called said meeting for the sole purpose of receiving the inventory of the property and effects of said corporation; that if said meeting had been lawfully convened, that was the only business

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which could have been properly transacted. The defendant denies that there was any power in the alleged meeting to declare a dividend of any kind; that prior to this time and while plaintiff and one W. A. Mays were directors in this company, and the plaintiff was its secretary and manager, receiving a large salary for what should have been honest and faithful service, the said parties entered into a conspiracy with another stockholder, N. J. Catrow, to depreciate the property of the company, allowed the machinery to run down, the stock to be reduced, failed to renew the contracts for stock, and otherwise impaired the value of the plant in order to make a showing of large earnings and cripple the plant for further use; that C. L. Bookwalter, who made the resolution for the declaration of the dividend at the meeting of the board, was induced thereto by the wrongful and fraudulent conduct of the plaintiffs and Mays, and that it was only because plaintiff and Mays deceived Bookwalter and the other directors by representing that the financial condition warranted a dividend, that the Bookwalters did not oppose a dividend of forty per cent. or any other dividend at the time in excess of twenty-five per cent., as the financial condition of the company did not justify in excess of that amount.

Defendant further says that the minutes of the meeting were never approved by the board, and that the directors subsequently voted to rescind the action of the board in declaring a dividend, and that the stockholders duly assembled, duly approved the action of the board in rescinding the dividend; that the plaintiff was unfaithful to his trust as an officer because he had already planned in connection with said Mays and Catrow, to establish a competing wheel company (and afterwards did establish such company), in the same city, to-wit, Miamisburg, where the defendant company is situated and used his position as an officer of the company to leave it in a condition, if possible, where it could not continue its business successfully.

For reply, the plaintiff avers that there was a meeting of the board of directors of the defendant company on September 8, 1902, and that a dividend of forty per cent. was declared by said board at this meeting on said date, and denies each

and every other allegation in the second defense of the answer contained.

Plaintiff further says that whatever alleged action, if any, was taken by the board of directors of defendant company after September 8, 1902, in reference to the time of payment or in any way affecting the payment of the unpaid balance of six and two-thirds per cent. of said dividend or otherwise, was taken and done without the consent or approval of the plaintiff, and that the alleged subsequent action of the stockholders approving the said alleged action of the board of directors was taken long after the filing of the petition herein, to-wit, March 20, 1903, and that whatever action, if any, was taken at said alleged meeting of the stockholders in reference to the payment of or in any way affecting said dividend or the unpaid balance of six and two-thirds per cent. thereof, or in approving the said alleged action of said board, was taken and done without the consent or approval of this plaintiff. Plaintiff further says that he never received any notice of the object and purpose of said meeting of stockholders on March 20, 1903, or of the business to be transacted thereat. Wherefore, he asks judgment as prayed for in his petition.

For a reply to the amendment to the amended answer, plaintiff says, after averring as to the declaration of the dividend and the meeting of the board of directors, that at that date he was secretary of the company and called the meeting. He admits that he knew the president of the company was absent from the county and state, but avers that he did not know his address or suppose his presence necessary, and admits that September 8, 1902, was the regular meeting of the board of directors, and denies each and every other allegation in the amendment to the amended answer contained.

The evidence in this case shows that the Bookwalter Wheel Company is an Ohio corporation, with a paid up capital stock of seventy-five thousand dollars; that on September 8, 1902, it had a directorate composed of five members, William Gamble, William A. Mays, Charles L. Bookwalter, W. L. Bookwalter and Lee Mitchell—William Gamble being president, and Lee Mitchell (the plaintiff), secretary and treasurer; that on Sep-

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tember 2, 1902, such board of directors met at the office of the company in Miamisburg, Ohio, the minutes of which meeting are as follows:

“Miamisburg, Ohio, September 2, 1902. Board called to order by V.-P. Bookwalter. Minutes of last meeting read and approved. Secretary reported inventory under way but not completed. Signed, Lee Mitchell, Secretary; W. S. Bookwalter, V.-P.; present: W. S. Bookwalter, C. L. Bookwalter, Lee Mitchell.

This meeting was pursuant to Section 5 of the by-laws of the company, which reads as follows:

“It shall be the duty of the board of directors to meet the first Tuesday of each month to transact such business as may come before it. A majority of said board shall constitute a quorum to transact business. Special meetings may be called by president or secretary at any time.”

The testimony further shows that the end of the company's fiscal year was August 31, and that it had been the custom of the company to have an inventory taken during the latter part of August of each year, and to have report of the same made at the September meeting of the board, and thereupon to declare such dividend as the condition of the company seemed to warrant, the dividend for 1896 having been declared on September 21; for 1897, September 4th; for 1898, September 6th; for 1899, September 8th; for 1900, September 10th; for 1901, September 21st.

The testimony further shows that subsequent to the meeting of September 2, 1902, the board held another meeting on September 8, 1902, the minutes of which are as follows:

“Miamisburg, September 8, 1902. Board of directors met at the call of the secretary for the purpose of making report of inventory taken September 1st. V.-P. Bookwalter presiding. Present: W. A. Mays, Dr. Bookwalter, C. L. Bookwalter and Lee Mitchell. A summary statement of the condition of the company was read, a copy of which will be found on the following page. On motion of C. L. Bookwalter and seconded by W. A. Mays, a dividend of forty per cent. was declared upon the capital stock paid in, making \$30,000. The treasurer stated it would not be convenient to pay in full at once but to pay

thirty-three and one-third per cent. now and six and two-thirds per cent. later. No further business coming before the board, it adjourned. W. S. Bookwalter, V.-P.; Lee Mitchell, secretary."

The following is the summary statement referred to:

"Summary statement after taking inventory September 1, 1902. Assets—Real estate, \$15,500.42; machinery, \$15,525.00; team, \$150.00; cash in bank and on hand, \$21,946.28; insurance prepaid, \$432.80; bills receivable, \$9,619.28; personal accounts receivable, \$12,672.73; tire, tirebolts, etc., \$4,018.58; flanges, rivets, etc., \$5,855.80; supplies, \$558.70; merchandise on hand, \$33,890.72; total, \$120,170.31. Liabilities—Capital stock, \$75,000.00; surplus fund, \$13,787.85; total, \$88,787.85. The net earnings for year, \$31,387.46."

This, it will be noticed, shows no bills payable. The testimony further shows that after said meeting of September 8, checks were mailed by the secretary of that date for thirty-three and one-third per cent. of the dividend, and that accompanying letters read as follows:

"At a meeting of the board of directors held this day a dividend of forty per cent. was declared upon the paid up capital stock. We enclose check to your order for thirty-three and one-third per cent. of this, balance of six and two-thirds per cent. will be paid later. Respectfully, The Bookwalter Wheel Co., per Lee Mitchell, secretary and treasurer."

The plaintiff in this case was on said date a stockholder owning ninety shares and would be entitled under such a dividend legally declared to \$3,600. He did receive \$3,000, but the \$600 is still unpaid.

The testimony further shows that on page 106 of the company's ledger this plaintiff was on September 8, 1902, credited with \$3,600, and that the surplus fund in the ledger was charged with the same amount. Similar entries were made as to the dividend of each stockholder.

The testimony further shows that William Gamble, who was the president of the company, was absent from both the meeting of September 2 and September 8; that at that time of the year it was his custom to be in New Hampshire, or at least

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out of this state, where he went because of hay fever with which he is afflicted.

Mr. Mitchell testified that he notified the other members of the board personally of the meeting of September 8, but not knowing Mr. Gamble's address and not considering it necessary, he had not mailed him a notice.

The testimony further shows that the following dividends have been declared by this company: 1899, on net earnings, \$26,299.70, twenty-five per cent., twelve and one-half being paid September 8, and twelve and one-half paid September 25. 1900, on net earnings of \$26,290.24, thirty-three and one-third per cent. paid on September 21. 1901, on net earnings, \$26,180.28, thirty-three and one-third per cent. 1902, on net earnings of \$31,382.46, forty per cent., and that William Gamble was president in the year 1901 only, and that said dividends were paid without any complaint heretofore because of his absence.

The testimony further shows that regular and called meetings of the board of directors were afterwards held in 1902, on September 24th (when the resignation of Mr. Mitchell, the secretary and treasurer, was accepted, to take effect October 1st); on October 1, October 27, 1902, January 6, 1903, and on the last mentioned date the minutes are as follows:

"Dr. W. S. Bookwalter offered the following—'Whereas, at a meeting of the board of directors held on September 8, 1902, a motion was adopted declaring a dividend of forty per cent. upon the capital stock paid in, thirty-three and one-third per cent. of which be paid at once and six and two-thirds per cent. paid later, when it would be convenient to pay it—Resolved, That the board of directors rescind their action taken on above date as to payment of the six and two-thirds per cent. and that the action of the board as to such six and two-thirds per cent. be hereby declared null and void *for the reason that there are necessary repairs to be made to the plant of the company and the installation of automatic sprinkler equipment and other good reasons why such six and two-thirds per cent. dividend can not be paid. A vote was taken unanimously adopting this resolution.*'"

The minutes of the corporation further show that pursuant to the regulations and the by-laws and notice, the annual stock-

holders' meeting was held at the office of the company on January 19, 1903, at which no action was taken relative to this dividend; that afterwards, and after this suit had been brought in January, on March 20, 1903, another stockholders' meeting was held, at which the following resolution was offered by Dr. Bookwalter:

"Whereas, at an alleged meeting of the board of directors of this corporation held on the 8th day of September, 1902, there was an attempt made to declare a dividend of forty per cent. upon the paid up capital stock of this corporation, and whereas said attempt was made because the stockholders then present were misled by the then secretary and manager of said corporation for the fiscal year then closing, and whereas, said alleged meeting of directors of this corporation was unlawfully convened and said dividend not legally declared, and whereas, the same dividend, to-wit, thirty-three and one-third per cent. has been paid to all the stockholders and no more to any, Therefore, be it Resolved, first, that said dividend of forty per cent. was not legally declared; second, that there was no intention on the part of those present at said alleged meeting to declare a dividend of forty per cent. to be paid at once, and that it was not intended that the six and two-thirds per cent., which has not been paid, should be paid until the board of directors should fix a date therefor; third, that the stockholders of said corporation hereby ratify the action of the board of directors held on January 6, 1903, in rescinding the attempted declaration of a forty per cent. dividend or any dividend in excess of thirty-three and one-third per cent. which had been paid."

This resolution was adopted, 501 $\frac{1}{2}$ shares voting in favor of the resolution, and 90 shares against it. The other shares were silent.

This suit was filed January 21, 1903. These are the main points in the evidence. Other matters testified to may be referred to in the opinion.

In this case the first question which presents itself for solution is, whether a valid dividend was declared by the board of directors of the Bookwalter Wheel Company on September 8, 1902.

This is an Ohio corporation for profit and its board of directors who, under the statute, control, exercise and conduct

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the property business and powers of the corporation, would be governed in their declaration of a dividend by any provision found relative thereto in the Revised Statutes of Ohio, and in any by-law passed by the corporation not inconsistent therewith.

Section 3269-1 of the Revised Statutes provides as follows:

“*[Corporate dividends to be paid from surplus profits only.]* Be it enacted by the General Assembly of the State of Ohio, That it shall not be lawful for the directors of any corporation organized under the laws of this state to make dividends except from the surplus profits arising from the business of the corporation.”

Section 3269-2 provides:

“*[Unpaid interest due corporation not to be included in profits.]* In the calculation of the profits of any corporation previous to a dividend, interest then unpaid, although due, on debts owing to the company, shall not be included.”

Section 3269-3 provides:

“*[Surplus profits; how ascertained; prohibiting advertisement of capital not subscribed and paid in.]* In order to ascertain the surplus profits, from which alone a dividend can be made, there shall be charged in the account of profit and loss, and deducted from the actual profits—

“1. All the expenses paid or incurred, both ordinary and extraordinary, attending the management of the affairs and the transaction of the business of the corporation.

“2. Interest paid, or then due or accrued on debts owing by the corporation.

“3. All losses sustained by the corporation, and in the computation of such losses, all debts owing to the corporation shall be included which shall have remained due without prosecution, and no interest having been paid thereon for more than one year, or on which judgment shall have been recovered, and shall have remained for more than two years unsatisfied, and on which no interest shall have been paid during that period.”

So far as these sections of the Revised Statutes are concerned, we find from the evidence that the directors substantially complied with them in declaring this dividend. The company was at the time in a splendid financial condition, without indebt-

edness, with visible assets of \$120,170.31, and had a surplus fund of over \$13,000—the net earnings for the year 1901-2 being \$31,382.46.

Under the statutory law of Ohio, a corporation may provide for the time, place and manner of calling and conducting its meetings, and for the duties of its officers, etc.

Section 5 of the by-laws of this corporation, provides that it shall be the duty of the board of directors to meet the first Tuesday of each month to transact such business as may come before it. A majority of said board shall constitute a quorum to transact business. Special meetings may be called by president or secretary at any time.

Section 6 provides it shall be the duty of the president to preside at all meetings of the stockholders and directors, to sign the records thereof, etc.

Section 7 provides that it shall be the duty of the vice-president to perform the duties of the president during his absence from the office of the company or inability.

The meeting of September 2d was a regular and stated meeting of the board, being on the first Tuesday of the month. At this meeting, being the first after the termination of the fiscal year of the company, it was customary for the secretary to present for the consideration of the board the annual inventory.

The minutes of this board meeting show that the secretary announced that the inventory was under way, but not complete. No adjournment is shown.

On September 8th, the board came together again, the testimony showing that the secretary had notified them—except Mr. Gamble—that he was now ready with his inventory. The inventory was read, and after informal discussion, the dividend in question, on motion of C. L. Bookwalter and seconded by W. A. Mays, was declared. The board then adjourned.

The objections of the defendant as to the legality of this meeting are, first, that it was a special meeting called solely for the purpose of receiving the inventory of the property and the effects of the corporation, and that that was the only business which could be lawfully conducted thereat; second, that

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notice was not served on all the directors of the calling of such meeting, and especially upon Mr. Gamble.

If this had been a special meeting *solely for the purpose alleged*, the contention of the defendant would carry some weight, but looking at the minutes of both meetings and considering the oral testimony in the case, with reference to that, we can not come to that conclusion. The fact is, the meeting of September 2d disbanded without formal adjournment, and the business which would have been conducted on that day was conducted on September 8th, at which time the secretary notified them severally and personally that he would be ready with the inventory.

There is nothing illegal about this, nor about their conducting such other legal business as it was their custom to do at the September meeting in each year. Common sense and the law are never very far removed from each other, and it seems to us that this is the common sense way of looking at this situation. No notice, of course, was necessary to be given the directors for the regular and stated meeting of the board on September 2d, which was consistent with the by-laws. Each director was presumed to know that on that day at that time such meeting would be held, and the by-laws do not provide for any notice. Notice is required when a director or stockholder would be ignorant of the occasion without it, but when he knows without notice, or when the time and place of meeting is so fixed that he is presumed to know, no notice is required, and if our view of this matter is correct, and the meeting of September 8th was but an adjournment of the meeting of September 2d, and was intended to, and did accomplish what would have been done at the meeting of September 2d, had the inventory been ready, the business done at the meeting of September 8th being entirely proper to be done at that meeting of September 2d, no notice would be necessary to the several directors, of the meeting of September 8th. See 35 O. S., p. 10; 14 O. S., p. 31.

So that the failure to notify Mr. Gamble would not be important in this case, nor in any sense render either meeting invalid, nor the things done there futile and void.

Suppose, however, that the meeting of September 8th was a special and irregular one because of the failure to notify Mr. Gamble. No objection, so far as the records of the corporation show, has ever been made to it on that ground by any director, nor has the legality of the dividend since been questioned by the old or new boards because of that fact. A new board was elected January 19, 1903. Since then other boards have annually been elected, and by none of these to the present time has any action been taken rescinding the declaration of September 8th because of the alleged irregularity of the meeting, and it seems to us that the objection, if made, should come from this source. The board of directors under the statute have control of the corporation and its affairs, with full power to declare a dividend consistent with the statute, and while the stockholders might by resolution advise them that action looking to the rescission of an illegal and invalid declaration of dividend should be taken, we doubt if they could, by resolution, in a general stockholders' meeting, rescind all or any part of a dividend.

In the language of the Supreme Court of Ohio, in the case of *Simms v. City Railway Co.*, 37 O. S., 565—

“They (the directors) represent the corporation in all its business affairs, and were authorized to transact all the corporate business within the scope of its authority. In the exercise of these powers, the directors are at all times subject to the equity jurisdiction of the courts on the application of a stockholder or minority of stockholders, to restrain all breaches of trust, or the exercise of powers not delegated to them, to the injury of stockholders.

“If, however, the directors, who are presumed to represent the will of the majority, act within the scope of their powers, their will must govern in the absence of fraud or breach of trust.” (Citing 18 Howard [U. S.], 342; 2 Russ. & M., 470; 10 New Jersey Equity, 171; 29 Vt., 545; 22 N. Y., 258; Field on Corporations, Sections 141-142.)

And whether the directors in the case at bar did or did not act within the scope of their powers is for a court to determine in a proper case. The action taken by the stockholders in their attempt to rescind the dividend we do not, therefore, consider as conclusive.

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Further objection is made to the declaration of this dividend on the ground that it was fraudulently brought about by Messrs. Catrow and Mitchell, and was intended, together with other alleged acts of these gentlemen, to cripple the company to the benefit of a similar concern which Mitchell is claimed to have had it in mind to start, prior to and at that time. Reference is made to the Mitchell Wheel Company, which Mr. Mitchell did promote after his resignation from the secretaryship on.

As to these charges, the court has only to say that we find them wholly unfounded and unwarranted so far as any testimony in this case showed. Suspicions are not facts, nor can facts always be built about them so skillfully as to give them the appearance of solidity necessary to convince. The splendid success of this company for years, and especially for the years 1899, 1900, 1901 and 1902 shows that not only the gentlemen referred to, but everyone interested in the concern, were acting honestly and harmoniously for its best interest.

In 1899, as we have said, the net earnings were \$26,299.70; in 1900, \$26,390.24; in 1901, 26,180.28, and in 1902, the year in question, \$31,382.46. In other words, in four years, with a capital stock of \$75,000, the company's net earnings were \$110,252.68, during all of which time Mr. Mitchell was the company's secretary and manager. Nor was the dividend for 1902 extraordinary when compared to dividends of former years to which I have already referred.

We are of the opinion that this dividend was lawfully declared without ulterior motive on the part of the directors of the company, and that its declaration did not constitute either a fraud on the company or a breach of trust on the part of the directors.

Having found the dividend lawfully declared, what was the effect of the action of the *board of directors* on January 6, 1903, rescinding six and two-thirds per cent. of said dividend?

We must remember, of course, that the dividend declared was in its entirety forty per cent.; that the separation of six and two-thirds per cent., to be paid at a later date, did not individualize that and make it a thing to be considered apart from the other thirty-three and one-third per cent. Whatever rights

accrued to the stockholders at the declaration of the dividend would pertain to the whole dividend, so that any subsequent action of the board would be subject to these rights.

As the evidence shows, the dividend was declared, notice of the same with check was sent to each stockholder, the amount of his dividend was credited to each on the ledger of the company, and the surplus fund charged with it.

The net earnings of a corporation are the property of the corporation only until such time as a dividend is declared. 17 C. C., p. 129.

"When a corporation declares a dividend, the earnings represented by the dividend are no longer represented by the stock, but become a debt due to the owner of the stock at the time of the declaration. * * * That the dividend is payable at a future date does not affect the stockholders' right. The moment a dividend is declared by a joint stock company, the company becomes a debtor and the stockholder creditor for the amount payable on demand." (*Wheeler v. N. W. Sleigh Co.*, 39 Fed. Rep., p. 347.) Also, Chase's Decisions, p. 168.

In the 42 Conn., p. 24, the case of *Beers v. The Bridgeport Spring Co.*, the court passing on the case say:

"When the defendant corporation, by the legal votes of its directors, declared the dividends in question from profits theretofore earned and received, made the same payable without interest at such time as might be directed by the board, and ordered the amount to be placed *pro rata* to the credit of the stockholders on its books, the share of each stockholder in the several amounts was thereby severed from the common funds of the corporation and became his individual property. Thenceforth the company owed him a debt, payment of which at a proper time he might demand, and upon refusal enforce by the aid of a court of equity (*King v. Patterson & Hudson River R. R. Co.*, 29 N. Jer. Law, 504; *Redfield on Railways* [1st Ed.], 240, 597; *Leroy v. Globe Ins. Co.*, 2 Edwards' Cha. R., 657). The proviso as to the time of payment does not absolve the company from all obligation to him: there remain all the essential elements of a debt, certain in amount, and certain to be paid upon a day not yet appointed, but which it is the duty of the debtor at some time to name. The legal effect of the vote is that the debt is to be paid within a reasonable time. The corporation having declared that it had

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received for and owed to each stockholder a certain sum of money, and having set the same apart from its own funds for his sole and separate use, can not thereafter nullify its votes or repudiate its obligations by declining to pay the dividend or to name any time when it would pay it."

When, therefore, this dividend was declared, it became a debt of the company to the stockholder as an individual to be paid within a reasonable time, and as such debt was beyond the control of both the stockholders and directors.

What was the condition of the company in the months following this declaration? The cash book balance once a month shows that they had on hand September 30, \$2,482.47; October 31, \$7,037.42; November 31, \$8,292.50; necessary to pay this six and two-thirds per cent., \$4,550. So that this six and two-thirds per cent. ought to at least have been payable November 31, 1902, and was due and payable when this suit was brought in January, 1903.

The resolution passed by the board of directors was a recognition of the validity of the act of the board on September 8th, and as we have said we do not believe that the stockholders assembled in general meeting had authority to nullify the act of the board as they attempted to do in March of 1903. If the board did act legally, as we have found, no such resolution was necessary, and even if illegally, how can the stockholders be heard to complain who have received and are enjoying the benefit of thirty-three and one-third per cent. of the dividend? This of itself is plainly an acquiescence in the board's act, and if so, would be another reason why it should be carried into effect, for as I said in the beginning of the discussion of this point, the dividend is an entirety and must always be so regarded by the court.

From the foregoing, I am persuaded to find for the plaintiff and against the defendant in the sum of six hundred (\$600) dollars, with interest from January 19, 1903.

W. A. Reiter, McMahon & McMahon, for plaintiff.

Van Deman, Burkhardt & Shea, for defendant.

MODE OF USE OF STREETS BY TELEPHONE COMPANY.

[Probate Court of Cuyahoga County.]

CLEVELAND TELEPHONE COMPANY V. THE VILLAGE OF SOUTH NEWBURGH.

Decided, November 15, 1906.

Telephone Poles and Wires—Use of Streets for Erection of—Authority of Probate Court with Reference to Mode of—Duration of Telephone Franchise—Extraordinary Uses of Street—Such as for Moving Buildings—Limitations on Power of Probate Court.

1. A telephone company obtains its right to the use of the streets from the Legislature, and the function of the probate court includes neither the length nor extent of such use, but is limited strictly to the mode of use.
2. The moving of a building across or through a public street, in such a manner as may be prescribed or permitted by ordinance enacted by council, is a lawful, but not a public use of the street, and involves a privilege with reference to which the probate court has no duty to perform in fixing the mode of use of the streets by a telephone company.

HADDEN, J.

On the 28th of April, 1906, the petition was filed in this case, setting forth the corporate capacity of the parties, and that the plaintiff in carrying out the purpose of its organization and the discharge of its obligations to the public, was about to construct lines of telephone along and upon certain roads, streets, etc., in the village of South Newburgh, including the posts, fixtures, etc., necessary for its wires; and after specifying some twenty-one or more streets and public highways, the further averment is made that the plaintiff had undertaken to reach an agreement with the village as to its mode of use of such streets and highways, and the location and character of the structures to be placed thereon by it for such purposes, and that it had made due application to the council and officials of the village for that purpose, and had submitted maps and plats showing the location of the poles, and had specified to the village the kind and character of poles and other construction to be erected.

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The averment is then made that the plaintiff was wholly unable to reach an agreement with the defendant or its officials, as to the mode in which plaintiff may use said streets or any of them; and the village, through its council, has refused to negotiate further with the plaintiff with respect to the use of said streets, except on condition that the plaintiff consent to the terms of a certain ordinance heretofore passed by the council, to which terms plaintiff can not agree.

The prayer of the petition is that the court determine the mode of use of the streets in petition specified, in the manner therein set forth to be a reasonable use thereof, and one which will not incommode the public in their use of said streets and highways; and that the court will, by its decree, fix such mode of use, or a reasonable mode of use, as by law prescribed.

On May 11, 1906, a demurrer was filed to the petition, which is very general in its character, specifying no cause or ground of demurrer, and this was overruled. An answer was filed June 13, 1906, admitting the corporate capacity of the parties and the making of application, and denying all other allegations in petition contained.

On the hearing, only two points or matters were presented to the court, it appearing that in all other respects the parties have agreed. The defendant insists that there should be some limit in time of the use and occupancy by the plaintiff of its streets, and it also insists that at any time when it may become necessary to move or transport vehicles or structures along or across the streets of the village, which are of such a size and nature as to require alteration or adjustments of the equipment of plaintiff, the plaintiff, after having five days' written notice so to do, should be obliged to make the necessary alterations or adjustments at its own cost.

As to both of these claims, the plaintiff insists that they are not the subject of agreement, and the court has no power to make any order regarding them; so that the specific questions presented are:

First. Can the court, in this proceeding, say when the right of the plaintiff to use the streets of the defendant shall end?

Second. Can the court make any order imposing upon the

plaintiff any duty in the way of altering or adjusting its equipment, in case same may become necessary for the purpose of allowing buildings or other structures to be moved along or across its streets?

The statute which gives the court any jurisdiction in this matter is Section 3451 of the Revised Statutes, and reads as follows:

“When any lands authorized to be appropriated to the use of a company are subject to the easements of a street, alley, public way, or other public use within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they can not agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, *so as not to incommode the public in the use of the same*; but nothing in the section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness.”

As pointed out by Judge Minshall, in the case of *Zanesville v. Telephone Co.*, 63 O. S., 450, the section as enacted related to telegraph companies, but was subsequently made applicable to telephone companies.

In the case above referred to, the Supreme Court held the statute to be unconstitutional, because it required probate courts (which, according to the Supreme Court, belong to the judicial and not the legislative or executive departments of the government) to direct the mode in which a telegraph or telephone company may use the streets and alleys of a city or village, when the company and municipality can not agree. The court seemed to take the position that the statute required the probate court to perform legislative rather than judicial functions.

But in 64 O. S., 67, on a rehearing of the same case, the Supreme Court reversed its former holding, saying, among other things, that the fact that a power is conferred by statute on a court of justice, to be exercised by it in the first instance

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in a proceeding instituted therein, is itself of controlling importance as fixing the judicial character of the power, and is decisive in that respect, unless it is reasonably certain that the power belongs exclusively to the legislative or executive department.

And further, that where the law confers a right and authorizes an application to a court of justice for the enforcement of that right, a proceeding upon such application is the exercise of a judicial function, though the order or judgment authorized be of such a nature that it can only be performed or its execution enforced progressively during a future period.

In the opinion written by Judge Williams, this language is used on page 79:

“It is essential that the rights of the two corporations, each holding separate franchises from the state with respect to the uses which each are claiming of the same property, should be so adjusted that both may be able to carry out the purposes of their creation and neither defeated in their objects by the conduct of the other.”

Again, on pages 80 and 81:

“It will be noticed that it is not *the right to use the streets* that is made the subject of agreement between the company and the municipal authorities, or of determination by the court. That right, as has been seen, is granted to the company directly by the Legislature, and is not made to depend upon any consent or agreement on the part of the municipality. It is only the *mode* of such use that becomes the subject of agreement or judicial determination. The power of eminent domain residing in the state, it has been held under our present Constitution, is committed to the control of the General Assembly, by the grant of legislative power, and it may be exercised by that body directly, or by agencies, like private corporations, in such manner, under such conditions and through such tribunals having capacity to receive the jurisdiction, as may be by legislative enactment provided,” etc.

And again, on page 83, in discussing the question whether this proceeding in this court is in substance if not in name, an appeal from the village council action, the court uses this significant language:

“The council is given no power to direct in what mode the lines of a telephone company shall be constructed in the streets of a municipality. Its sole province is to come to an agreement with the company, in regard to the mode of using the streets by the company. The making of such agreement between the parties is not involved in the proceeding instituted in the court, nor is its action in that regard in any way revoked. The jurisdiction conferred on the court is to determine the controversy between the disputant corporations, arising from their disagreement or failure to agree, by an order binding on both, directing in what mode the telephone lines shall be constructed in the streets and alleys so as not to incommode the public in the use of the same.”

These expressions of the Supreme Court make quite plain the nature and extent of the jurisdiction of this court. It is “the mode of use” which is in question, not the length or extent of the use. The company gets its rights to use the streets from the state, through the Legislature, and if it had been the legislative intent that the use should be limited in time to a certain period, it would doubtless have said so, but whether it has said so or not, it has not given to this court any power to so limit it, and the first question must therefore be answered in the negative.

The second question is more difficult to decide, and can not be answered without a somewhat extended examination of the adjudicated cases. In the first place, the language of the statute is quite significant and has an important bearing. The court’s power to direct the mode of construction is limited in an important particular. The mode it fixes must be such as not to incommode the public in the use of the streets, alleys, etc.

The thing to be cared for by the court then is the public’s use of the streets. All other rights in the streets, and all other uses thereof, are to be left out of the consideration; so that the question is clearly presented whether the use of a street to move a building along it or across it—a building, we will say, wide enough to occupy the street from curb to curb, and high enough to require the cutting of wires which are strung so high as not to interfere with any other use of the street—is a use of such street by the public.

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No adjudications of this question in this state have been cited, nor have I been able to find any. In the case of *Eureka City v. Wilson*, 15 Utah, 53, decided in 1897, it appears that the defendant, Wilson, was convicted for moving a building upon the street in violation of an ordinance of Eureka City. In affirming the conviction, the court uses the following language with regard to the use of the street by a house mover:

"This, however, is not an ordinary or a usual use of the street, and the appellant (Wilson) could not claim the privilege so to use it, as a matter of right."

Again, on page 62, the court says:

"The principal design of a highway is to accommodate public travel in the usual and ordinary mode, and this is so at common law; but it may lawfully be used for all purposes where the occasion and circumstances permit such use, without an unreasonable interference with the free passage over it of those who are traveling upon it in the usual manner."

Again, the court says:

"It was doubtless within the power of the city council of Eureka City to entirely prohibit the moving of buildings over its streets, * * * and such council, having the power to regulate the use of the streets and prevent obstacles being placed thereon, may, by ordinance, prevent the moving of buildings thereon, without the permission of the mayor or other officer; * * * and such power is not legislative but administrative. Where a municipal corporation may prohibit a thing altogether, it may prohibit it conditionally, and confer upon any officer or officers, power to determine whether a fact or state of things exists which will authorize the doing of it."

In a nisi prius case, reported in the 14 N. J. Law Jour., page 295 (*New York Telephone Co. v. Peter Dexheimer*), the court in charging the jury in an action for damages caused by cutting the plaintiff's telephone wires by defendant in order to enable him to move a house along the highway, says, among other things, that the use of a public highway for the purpose of travel in moving a building is not within the right which is enjoyable by the public in a public highway, and that the object of a public highway is to accommodate the public for the purposes of such travel and intercourse as are required for

public convenience, and for the transaction of public business; the use of the public highway for the purposes of travel in moving buildings was not within the right which was enjoyable by the public in that public highway.

In *Dixon v. Kewance Electric Light & Motor Co.*, 53 Ill. App. Court, 379, decided in 1893, the court held that moving a house along a public street is not within the right enjoyed by the public as a use of public streets.

The only case which is at variance with those above cited, is that of the *Telegraph Co. v. Will*, 1st Phila. Reporter, 270, decided in 1852, where it is held—

“That the act of the defendant in moving the house was a lawful one; he had a right to the use of the highway for his lawful business, *usque ad celum*. The Legislature could not have intended to have restricted this common right without very express words. The company therefore seems subject to the contingency of such a use of the highway, if they do not take care in placing their wires.”

There is no doubt that the use of the street for the purpose of moving a building in such a manner as is prescribed or permitted by the ordinance enacted by a city council is a lawful use of the street, but it is not the use by the public of the street. It is an extraordinary use of the street by an individual, and around it each municipal legislature throws certain restrictions in the interest of the use of the public of the street, and these restrictions clearly distinguish it from the public use of the street.

Upon the municipal corporation is cast the burden of keeping the streets open for travel and free from nuisance. The statute has not imposed upon this court the duty of performing anything with regard to the streets, which the municipal corporation is bound by its very nature to take care of. The conclusion is therefore reached that the court can make no order or direction as to how the poles or wires of the company shall be placed or managed or handled, in case their location should need to be changed in order to make the moving of a building along or across the street possible, for the reason that such use is not the public use, or the use of the public of the street.

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Assignment of Annie E. Ashbaugh.

DIVORCED WOMAN NOT ENTITLED TO HOMESTEAD EXEMPTION.

[Probate Court of Clark County.]

IN THE MATTER OF THE ASSIGNMENT OF ANNIE E. ASHBAUGH,
TO OLIVER H. MILLER, ASSIGNEE.*

Decided, 1906.

*Homestead—Insolvent Divorced Woman—Not Entitled to Exemption—
Section 5435—Varying Punctuation of—Grass Widow—Not a
“Widow” within Contemplation of the Statute—Words and Phrases.*

A divorced woman is not a “widow” within contemplation of the statute allowing homestead exemption to insolvent debtors with families or other dependents.

GEIGER, J.

On June 28, 1906, Annie E. Ashbaugh assigned a stock of miscellaneous merchandise to Oliver H. Miller. On July 26 the said assignor made a demand upon the said assignee of certain goods and chattels in lieu of a homestead, which demand was by the assignee promptly refused. On the same day there was filed in the Probate Court of Clark County a motion of the assignor for an order requiring the appraisers to set off to her the property selected by her in lieu of a homestead, and that in the event of a sale before the hearing of the motion, an order be issued requiring the assignee to pay to her out of the proceeds of the sale the sum of \$500. The property was sold by the assignee, and the question now is, whether the said assignor is entitled to \$500 in lieu of a homestead.

The assignor filed an affidavit, from which it appears that she was married in 1878, in Ohio, and that, in the winter of 1897 her husband, by the consideration of the Court of Madison County, Indiana, procured a decree of divorce from her, and thereby caused the marriage contract and relation theretofore existing between him and her to be dissolved; that she has not since remarried, and that she is a resident of the state of Ohio and not the owner of a homestead. It also appears that she has no minor children and is living alone.

* Affirmed by common pleas court January 14, 1907.

Section 6348 of the Revised Statutes reserves to an assignor all his homestead rights. Section 5435 provides:

“Husband and wife living together, a widow or a widower living with an unmarried daughter or unmarried minor son, may hold exempt from sale * * * a family homestead not exceeding one thousand dollars in value,” etc.

Section 5441 provides:

“Husband and wife living together, a widower living with an unmarried daughter or minor son, every widow, and every unmarried female having in good faith the care, maintenance and custody of any minor child of a deceased relative, resident of Ohio, and not the owner of a homestead, may, in lieu thereof, hold exempt” personal property not to exceed five hundred dollars in value.

It is claimed upon the part of the assignor that by virtue of her divorce from her husband, she is a widow within the meaning of the homestead exemption law and is entitled to her exemption.

It is claimed by the creditors that even though Annie E. Ashbaugh were a widow by the death of her husband, she would not be entitled to \$500 in lieu of a homestead, and they base their claim upon the punctuation of Section 5441, and the decision in the case of *Brown v. Parham*, 4 C. C.—N. S., 344, by the Circuit Court of Hamilton County, where it is held that a widow, not the owner of a homestead under Section 5435, is not entitled to hold exempt from levy and sale \$500 worth of real or personal property in lieu thereof, under Section 5441, when she does not have in good faith the care, maintenance and custody of any minor child or children of a deceased relative. This decision was rendered on Dec. 16, 1903. The statute then in force was passed April 26, 1898 (93 Ohio Laws, page 318). The punctuation of this statute has not been carefully preserved in the various enactments in reference thereto. In the act of 1898 the section reads and is punctuated as follows:

“Husband and wife living together, a widower living with an unmarried daughter or minor son, every widow and every unmarried female, having in good faith the care, maintenance

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and custody of any minor child or children of a deceased relative," etc.

Construing this statute thus punctuated, the court say—

"As now punctuated, the words 'having in good faith the care, maintenance and custody of any minor child or children of a deceased relative,' qualify the word 'widow' as well as the words 'unmarried female,' and a widow not having the care of such child can not hold property exempt under this section. When the case of *Wentzel v. Hayes*, 16 C. C., 110, was decided, Section 5441, Revised Statutes, as amended in 81 O. L., 148, contained no comma after the words 'unmarried female' as it now does. * * * This punctuation evidently influenced the court in that decision, as there is no sound reason why a widow should be entitled to an exemption that an unmarried female is not entitled to."

I can not agree with the decision of the court in *Brown v. Parham*, and I think the statute, punctuated as it was at the time of that decision, did not justify the exclusion of a widow from the enjoyment of her exemptions. The court says that there "is no sound reason why a widow should be entitled to an exemption that an unmarried female is not entitled to." It is a fact, however, that our statute has long recognized and provided for a difference in favor of a widow over any other unmarried female.

Section 5430 provides that "every person who has a family and every widow may hold the following property," etc. Section 5437 provides for a homestead for a widow or a minor child. Section 6040 provides for the widow's support for a year.

In the case of *Wentzel v. Hayes*, 16 C. C., 110, decided by the Cincinnati Circuit Court in the January Term, 1898, it is held that the widow was entitled under Section 5441, to a homestead exemption. The court say:

"She was a widow and as such she was entitled to homestead exemption although not having in good faith the care, maintenance and custody of a minor child. These provisions do not apply to a widow."

It is true that that decision was under the act of April 12, 1884, 81 O. L., page 148, in which the punctuation is slightly different, as follows:

"Husband and wife living together, a widower living with an unmarried daughter or minor son, every widow and every unmarried female having in good faith the care," etc.

The punctuation of the two is identical except that in the act of 1884 there is no comma after the words "unmarried female."

It was never the intent of the Legislature to deprive a widow of her statutory exemption by the placing of a comma after a single word.

Section 5435, which provides for a family homestead not to exceed \$1,000, reads and is punctuated as follows:

"Husband and wife living together, a widow or widower living with an unmarried daughter or unmarried minor son, may hold exempt from sale a family homestead not exceeding one thousand dollars in value," etc. Vol. 94 O. L., page 372, April 16, 1900.

The punctuation of Section 5435 has been unaltered since its passage in the present form in 1878. 75 O. L., 597-692.

In *Allen v. Russell*, 39 O. S., 336, the court hold that under the act of 1878 a widow may hold exempt from execution a homestead not exceeding \$1,000 in value, although she is not living with an unmarried daughter or unmarried minor son. The court say: .

"The latter provision (act of 1878) has been incorporated into the Revised Statutes, Section 5435, and properly punctuated, is as follows: 'Husband and wife living together, a widow, or a widower living with an unmarried daughter or unmarried minor son, may hold exempt from sale, on judgment or decree, a family homestead not exceeding one thousand dollars in value.' * * * Courts will repunctuate if necessary to render the meaning clear."

So that it is clear that under Section 5435, which provides for a homestead of \$1,000, a widow is entitled to the same even though she be not living with an unmarried daughter or unmarried minor son, and even though the punctuation would admit of a different grammatical construction. It is clear that if under Section 5435 a widow is entitled to the homestead, it must follow that under Section 5441 she must be entitled to the \$500 in lieu of the homestead. But it further

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appears that the punctuation of the statute as it was at the time of the rendition of the decision in *Brown v. Parham*, has been again altered in the act of April 22, 1904, 97 O. L., 282, where Section 5441 is punctuated as follows:

“Husband and wife living together, a widower living with an unmarried daughter or minor son, every widow, and every unmarried female having in good faith the care,” etc.

There can be no question that if Mrs. Ashbaugh was, at the time of her assignment, a widow within the meaning of the statute, she must be allowed her exemptions in the sum of \$500.

To establish her claim to exemption as a widow, the attorney for the assignor cites the case of *Kunkle, Assignee, v. Chas. A. Recser*, 5 Nisi Prius, page 401, decided by Judge Rockel of this court, in which it is held that a divorced man living with an unmarried minor son is a widower within the meaning of Section 5435 and Section 5441; and is entitled to homestead exemptions therein provided. If it is true that a divorced man is a widower, it is equally true that a divorced woman is a widow. The case decided by Judge Rockel, however, actually decides a proposition slightly different from that at bar, being to the effect that a divorced man living with an unmarried minor son is entitled to the exemption: the argument being that the exemptions provided for by the statute are for the benefit of the family of the debtor and not for the debtor himself. The Century Dictionary is quoted as defining a grass-widower to be a man who for any reason is living apart from his wife. The court says:

“There being several kinds of widowers, it would not be a violent presumption to presume that in the use of the general term ‘widower’ all were included. Especially is this true where the same reasons exist for a like application to all.”

The decision might be sustained on the ground that the exemption was made to the head of a family as in *Weber v. Beier*, 14 C. C., 277. But it is hard to bring the mind to the conclusion that the Legislature, in defining certain exemptions to be given to a widow or to a widower, had in contemplation a “grass” widow or a “grass” widower, or husband and wife

separated by judicial decree. There is no doubt that the Legislature has been tender of the widow and of the widower having an unmarried daughter or minor son living with him. But it is difficult to read into the statute a provision in favor of those who have failed to carry out to its completion the marriage contract but have sought the courts in an endeavor to sever their relation.

Sections 5699 and 5700 provide for the status of a divorced man or woman, where the divorce is secured under the laws of the state of Ohio. It is true that if a divorce is obtained in another state, the property rights of the divorcee are not affected, and that a divorce granted for the aggression of the husband is no bar to the dower rights of the wife (50 O. S., 726; 44 O. S., 645; 10 O., 27). But it has not been held in Ohio, except in the decision above referred to, that a divorced man or woman shall be considered as a widow or widower for the purpose of homestead exemption.

In the case of *Lugauer v. Weisgerben*, Cincinnati Superior Court, 13th Bull., 637, it was held that where the husband and wife were living apart, under judicial decree by which the wife had been awarded alimony and the custody of the minor child, the wife was not entitled to \$500 in lieu of a homestead, and the court say—

“To hold that a wife living apart from her husband under judicial decree allowing alimony, is entitled to the allowance, would, in our judgment, be doing violence to both the letter and spirit of the law.”

But see *Weber v. Beier*, 14 C. C., 277, and *Dithey v. Elifritz*, 8 C. C., 278.

In the case of *Rittenhouse v. Hicks*, 23 L. Bull., 269, it is held that the word “widow” as used by a testator may mean husbandless, and the court held that in that particular case a divorced woman was a widow, but the decision was based upon the evident intent of the testator, and indicates but that for that intent, a divorced woman would not be a widow.

In 30th American & Eng. Ency. of Law, page 520:

“In technical as well as ordinary use, the term ‘widow’ has reference to a woman who has lost her husband by death, the

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condition of widowhood being terminated by subsequent marriage. A divorced woman is not a widow upon the death of her former husband and can claim no rights as such."

See also Bouvier's L. D., Vol. 2, page 1228.

Both Sections 5435 and 5441 provide for exemptions to husband and wife living together. It would be a very violent assumption to say that the Legislature, in providing this protection to the family, should give it to the husband and wife only while they were living together, but that it should be extended to the same husband and wife after they had been separated by a legal decree and restored to their positions as unmarried persons.

In the case of *Moerlien v. Westmiller*, 4 C. C., 296, page 300, the court holds that the claim of the wife for a homestead should not be allowed, inasmuch as it is not claimed that at the time of the distribution she and her husband were occupying the premises as a homestead, but they were in fact occupying a different place and living separate from each other.

In *Dithey v. Elifritz*, 8 Cir. Court, 278, page 284, it is held that until a decree of divorce and alimony is obtained, the wife's right to a homestead as against creditors remains. After divorce or alimony is granted, her rights are then fixed by the terms of that decree, as provided by Revised Statutes, Sections 5699 and 5700.

If a husband and wife are divorced, according to the claim of the assignor, the husband becomes a widower and the wife becomes a widow, and *each* may under such a claim be entitled to a homestead exemption, a thing denied to the husband and wife living together. *Dwinell v. Edwards*, 23 O. S., 603.

It is well recognized that in the construction of remedial statutes providing for exemption, that the spirit of the statute should prevail, but I hardly think that the Legislature ever intended to provide a protection for a divorced man or woman under the terms "widower" or "widow." If the statute had read the way it is sought to be construed, Section 5435 would read as follows:

"Husband and wife living together, a widow or a divorced woman, or a widower or a divorced man living with an unmarried daughter, shall hold exempt a homestead," etc.

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Such a thing was never contemplated by the Legislature and the court has no right to read into the section such a construction, especially in the face of the fact that it is against the well recognized meaning of the terms used in the section.

The motion will therefore be overruled.

Clem V. Collins, for assignor.

George S. Dial, for the creditors.

John M. Cole, for the assignee.

**RENT FOR PREMISES HELD BY A DEFAULTING
PURCHASER.**

[Common Pleas Court of Cuyahoga County.]

JACOB GEIL, JR., v. L. G. J. LEHR.

Decided, December 15, 1906.

*Landlord and Tenant—Rescission of Contract for Sale and Purchase—
Forfeiture by Service of Notice—Purchaser in Possession—Waiver
of Trespass—Rent—Attachment for Necessaries.*

A defaulting purchaser of land who is in possession is a trespasser under claim of title, and the seller can not effect a forfeiture of the contract of purchase by mere service of notice and thereafter treat the purchaser as a tenant liable for rent, unless assent on his part to be so regarded can be shown.

BEACOM, J.

Plaintiff sued defendant in a justice court for rent, and attached property of defendant under authority of the statute authorizing attachment where the claim is for necessities. The facts are these:

Plaintiff and defendant executed a land contract by the terms of which plaintiff agreed to sell and defendant to buy a house and lot in the city of Cleveland, payment therefor to be made in installments, deed to be given upon full payment of purchase price. Defendant entered into possession of premises, made a small payment thereon, but failed to make his payments as stipulated in the contract. Thereupon about the 10th day of a certain month plaintiff entered upon the premises, asserted his right to possession and gave defendant notice to

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quit premises. After remaining a short time longer defendant voluntarily left the premises, and this action is brought to recover reasonable rental for the period that elapsed between the time when the owner entered the premises and ordered the defendant to leave and the time when he did actually leave; and that raises the question as to the relative rights of the parties hereto in said lands during said time. Plaintiff claims that by entering upon the premises and demanding possession defendant became his tenant and obligated to pay rental for whatever time he remained. Defendant claims that he had an interest in said premises of which he could be deprived only by a court of competent jurisdiction declaring his interests forfeited. Plaintiff relies upon the following provisions in the contract:

“In case default shall be made by the party of the second part, his heirs, executors, administrators or assigns, in any of the conditions above stipulated to be performed by him, it shall and will be lawful for the party of the first part, if he so elect to treat this contract as thenceforth void, and to re-enter upon said premises at any time after such default, without serving on the party of the second part, or any person holding under him, a notice to quit said land; and in case this contract shall be treated as thenceforth void, the party of the second part, or those claiming under him, shall thenceforth be deemed mere tenants at will under the said party of the first part, and be liable to be proceeded against without notice to quit under the provisions of the law regulating proceedings in cases of entry and detainer.”

The conclusion of the court in this matter is that there was no perfected forfeiture or rescission of the land contract by the mere service of notice on the contractee, nor until the forfeiture had been declared by a court of competent jurisdiction, or until possession was secured by the holder of the legal title. It may very well be that equity will not aid the purchaser to secure a full, legal title, by a decree of specific performance, if he is in default, and the seller has merely served notice of his intention to terminate the contract; the purchaser nevertheless has a species of title by the very fact of possession (originally lawful), until terminated, either (1) by mutual cove-

nant, or (2) by surrender of possession, or (3) by decree of a competent court.

It may not be necessary to decide this point in this case, however. The action was brought for use and occupation of the premises, as by a tenant. The circumstances clearly repel any such relation between the parties.

"If the occupant of land enter and hold without permission and right, he is a trespasser, and the owner can not waive the trespass and make him tenant, without his consent." 14 Ohio, 344.

"An action of assumpsit for use and occupation can not be maintained where possession is held adversely under claim of title." 1 Ohio State, 223.

"Where a parcel of land is occupied by a person not the owner, in such manner and under such circumstances that a contract to pay rent can not be implied, rent for such occupation can not be recovered." 21 O. S., 664.

If, therefore, the claim of plaintiff as to forfeiture of the contract by mere service of notice were correct, that fact alone would not give him a right to recover for use or occupation of the premises, in the absence of some contract by the purchaser, express or implied, to pay same, or some assent on his part to be regarded as a tenant from that date. Without such assent he was at most a trespasser holding the land under a claim of title.

Attachment discharged. Plaintiff excepts.

C. W. Swartzel, for plaintiff.

Noah S. Good, for defendant.

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ASSESSMENTS FOR SEWERS.

[Common Pleas Court of Licking County.]

CHARLES H. KIBLER V. CITY OF NEWARK ET AL.

Decided, January, 1907.

Sewers—Assessment for—Local Drainage—Expense of Construction Assessed, How—Benefits—Notice—Average Depth of Lots—Repeal of Statute before Assessing Ordinance was Passed—Injunction.

1. Where the amount of a sewer assessment does not exceed the special benefits to the land, the assessment is not rendered invalid because levied in terms by the abutting foot.
2. An assessment for a sewer will be regarded as having been made with reference to benefits, as required by Section 53 of the municipal code, when the proceedings with reference thereto are all regular, and the property owner enters no complaint until he seeks to enjoin collection of the assessment and there is no showing of fraud, or evidence that the assessment as laid unquestionably exceeds the special benefits to the property.
3. A property owner who is provided with a drain leading to a cesspool on his own property is not, on the ground that he is already provided with local drainage, exempt from assessment for a sewer laid in the street, having a proper outlet, and built in conformity with the requirements of the statute.
4. An abutting property owner is not entitled to written notice of the passage of an ordinance providing for the construction of a sewer.
5. The repeal of a statute relating to sewer improvements after proceedings for the construction of a sewer have been begun, but before the passage of the assessing ordinance, does not render the assessment invalid.

SEWARD, J. (orally).

This case is submitted to the court upon the pleadings and the evidence. The petition alleges that the plaintiff was the owner of certain real estate in the city of Newark, fronting 415 feet on North Fourth street, and about 600 feet on Charles street; its south line is about 500 feet long, on which is a large dwelling-house, a stable and two small out-buildings. After the water works was installed, and more than twenty years ago, he constructed a sanitary sewer, at his own expense, which is still in use, and adequate and without offense to the sense of smell or detrimental to health.

At the time of its construction, the defendant alleges, there was no system of sewers established and no sewers in the city and none within a half a mile of the property, and that he was compelled to discharge its contents into a cesspool; that the city, without actual notice, and without any notice, so far as he can recall, until some time after its adoption, adopted a resolution to improve North Fourth street, north of Log Pond Run by the construction of a sanitary sewer, on August 1, 1903 (should be 1902); that the costs and expenses thereof should be assessed against the lots and lands abutting thereon; that on the first day of December, 1903 (should be 1902), they passed an ordinance to improve said street to Log Pond Run; thence east to an alley along said run to Elm street; that the costs and expenses of said improvement shall be assessed per foot front, according to benefits on the property; that on June 20, 1904, council passed the assessing ordinance, levying an assessment upon the 415 feet of \$388.86, being .937 per foot front; that the amount should be paid within thirty days from the final passage of the ordinance or in ten semi-annual payments and should be certified to the auditor. And he prays for an injunction against the certification of the amount to the auditor. A preliminary injunction was allowed.

The issues are made up from the material facts alleged in this petition and by the answer filed by the city.

It is claimed by the plaintiff that the assessment is invalid:

1st, because, in making the same, the council disregarded the rule that the costs and expenses should be per foot front according to benefits, and arbitrarily multiplied the number of feet by 97.3; and 2d, because, in making the assessment, the council disregarded Section 53, which provides—"In all cases of assessments, the council shall limit the same to the special benefits conferred upon the property assessed"; 3d, because, in making the assessment, the council disregarded the section which provides that any lots or lands shall not be assessed that do not need local drainage or which are already provided therewith; 4th, that they disregarded their duty in assessing upon the whole of plaintiff's land to the depth on an average of 550 feet from North Fourth street; 5th, that no notice

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of the resolution to improve was served upon him; and a question is made as to whether such notice is necessary.

Now, taking up these matters in the order which I have indicated—The first is: That the council disregarded the rule that the costs and expenses should be per foot front according to benefits, and arbitrarily multiplied the number of feet by 97.3.

The 68th Ohio State, 603, holds that an assessment, otherwise lawful, is not rendered invalid because assessed in terms by the abutting foot, where it appears that the amount of the assessment did not exceed the special benefits to the land.

The syllabus of the 65th Ohio State, 211, reads:

“Where, in a suit brought by a treasurer to collect a street assessment, it has been judicially determined that the assessment made by the city authorities has in a substantial amount exceeded the special benefits conferred upon the property by the street improvement, the trial court has jurisdiction to go forward, upon proper pleadings, and determine what amount should be assessed; and it is not error for the court to refuse to set aside the assessment *in toto* and remit the question to the city authorities for their action.”

I read from the opinion of the court at page 214:

“The question to be determined was not whether *any* assessment might have been lawfully made. Confessedly one not exceeding benefits could have been lawfully made. Hence, the question was simply one as to amount. Issues of fact and of law looking to the determination of that question were properly joined by the pleadings; the parties were before a tribunal whose office is to hear and determine just such controversies, and capable of giving legal, and unless appeal is taken, conclusive effect to its judgment, and thus end the contention, and no substantial reason has been adduced, and we think none can be, why the parties should not work out their controversy by the aid of that tribunal. And this conclusion seems to be aided by the argument *ab inconvenienti*. It is conceded by counsel for plaintiffs in error that if a new assessment were made by the city authorities it would be subject to review by the courts, and if such municipal work may be reviewed upon the question of fact as to the amount of benefits, and the relation the same bear to the value of the land, it would seem that, where it has been judicially determined that the assessments made by the municipal authorities have exceeded the benefits conferred, and are, for that reason, illegal, economy

and the avoidance of a multiplicity of suits would demand that the matter of new assessments upon correct principles be worked out in the courts in the first instance rather than that the matter be remitted to the municipal authorities with the chance of further litigation in case the amount assessed should again be deemed by the owner to be excessive."

This is a case where the circuit court set aside the assessment because of irregularities, and the circuit court is affirmed, the Supreme Court holding that the court has a right to determine the matter where there is irregularity; that it is within the jurisdiction of the circuit court to determine the matter.

2. Because, in making the assessment, the council disregarded Section 53.

These proceedings were commenced under the statute as it existed before the enactment of the municipal code, and the court finds that the laws as then in existence govern even to the passage of the assessing ordinance. The assessing statute was repealed before the assessing ordinance was passed, but the court holds that that is saved under Section 79 of the Revised Statutes, Section 2289 provides:

"If in any such action it shall appear that by reason of any technical irregularity or defect—whether in the proceedings of the board of improvements, or of the council, or of any other officer of the corporation, or in the plans or estimates—the assessment has not been properly made against any defendant, or upon any lot or parcel of land sought to be charged, the court may nevertheless on satisfactory proof that expense has been incurred which is a proper charge against such defendant, or lot or parcel of land in question, render judgment for the amount properly chargeable against such defendant, or on such lot of land, but in such cases the court shall make such order for the payment of the costs as may be deemed equitable and proper."

I quote from the syllabus of 34 Ohio State. 551, at 552:

"9. Where the city council determines that the amount of the assessment does not exceed the value of the benefits specially conferred, its judgment in the premises, in the absence of fraud, is final and conclusive, unless modified by the council before the final confirmation, as provided in Section 588; but when the municipal authorities, in levying special assessments, do not undertake to determine the amount of the special benefits con-

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ferred, either in respect to the amount assessed, or in the apportionment of the burden, the assessment may be enjoined; and in an action for that purpose parol evidence may be introduced to show that the authorities did not act on the proper basis."

At page 571:

"A majority of the court think that where the city council determines that the amount of the assessment does not exceed the value of the benefits specially conferred, its judgment in the premises, in the absence of fraud, is final and conclusive, unless modified by the council before the final confirmation, as provided in Section 588; but when the municipal authorities, in levying special assessments, do not undertake to determine the amount of the special benefits conferred, either in respect to the amount assessed, or in the apportionment of the burden, the assessment may be enjoined, and in an action for that purpose parol evidence may be introduced to show that the authorities did not act on the proper basis. If this proposition means that the council may determine that the amount of the assessment does not exceed the value of the benefits specially conferred, without an actual valuation of the special benefits, and without notice to those who are to be assessed, I can not concur in it."

There is a dissenting opinion in that case.

The second paragraph of the syllabus in *Price v. Toledo*, 4 C. C.—N. S., page 571, reads:

"2. Where an assessment according to benefits for a street improvement has been in all respects duly and regularly made and all the proceedings are complete, and no complaint is made by property owners until an action is commenced to enjoin the collection of such assessment on the ground that it exceeds the benefits, the court will not grant such relief, unless the action of the council or other municipal authorities has been fraudulent or tantamount to fraud, or the assessment is so excessive as to clearly and unquestionably exceed the special benefits to said property."

And on page 63:

"We are of the opinion that we have no right as a court to interfere with an assessment and enjoin its collection on the ground that the benefits are not equal to the assessment, unless the assessment is fraudulent or there is such a disparity as to be clearly wrong and unjust and tantamount to fraud on

the part of the authorities. Where the assessment is so clearly and unquestionably excessive that there can be no material difference of opinion upon the question, we think that the court may grant relief. But where there is a mere conflict of evidence and where all the proceedings have been regular, where the notices have been given, where the proper officers have acted upon the matter and all legal steps taken and the party complains for the first time in a court of equity, in such case, we are of the opinion that the court ought not to interfere. To hold that the court should do so would be to require a re-examination and review by the courts in almost every assessment in this city and in every city in the state. There is hardly an assessment made for a street improvement, for a sewer or for any other public improvement, where there are not some who are of the opinion that they are assessed too heavily—that the assessment is too high. But we do not sit as a court of appeal from the action of the council or the board of equalization, to hear the case anew and review it upon the evidence and then according to our opinion determine what would be a fair assessment."

Now, as to the council disregarding the section which provides that any lots or lands shall not be assessed that does not need local drainage, or which is already provided therewith.

The 45th Ohio State, 407, the first branch of the syllabus:

"The curative provisions of Section 2289 and Section 2327 of the Revised Statutes, extend to irregularities or defects in the estimate of cost and expenses, which the council may direct to be made, after a plan of sewerage for the corporation, or any part thereof, has been approved."

I read from page 422, as to what constitutes local drainage:

"The question for determination under the statute is one of fact between the municipality and the owners of abutting property, viz: Whether certain lots or lands are so provided with proper local drainage, in the statutory sense, as to be exempt from the special assessment. The local drainage provided, which can be effective to exempt the property drained, must, of course, be of such character as to satisfy the statute. An ordinary surface drainage will not be sufficient. The dimensions, the mode of construction, the material used, the location, the outlet, the sanitary conditions, and other considerations should be such as would belong to a sewer or drain built substantially in conformity to the requirements of the statute."

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This is a case where a large sewer had been built in Cincinnati 40 years before the assessment for the sewer that was in question. It had been built by private parties at a very large expense, and it had been tapped by these parties who resisted the assessment. The court held in that case that they had ample local drainage, but that was a sewer leading to a proper outlet in the city; it was a large sewer. I don't remember the size of it, but it was immense and was built along Deer Creek, and they held that they were amply provided with local drainage. It was a large sewer and connections were made into a proper outlet; and the court held that they were not properly chargeable with the construction of another sewer; that they were not under obligation to connect with it.

In the 64th Ohio State, page 92:

"Where the lot of land is in need of local drainage, it is not exempt because it is entirely unimproved, and there is no immediate need for such drainage. Vacant lots and lands may, and usually do, receive a present special appreciable benefit from the construction of a sewer in proximity with and accessible by them for sewerage purposes, sufficient to sustain an assessment made on the basis of benefits."

In this case, the Supreme Court refer to to what is to be considered as proper local drainage:

"The question here, however, is somewhat different. It is whether present sufficient surface drainage constitutes local drainage within the purview of the statute; or must it be such as provides the land with adequate drainage for the necessary and usual purposes of sewerage. We think it must be of the latter character to work an exemption of the land from assessment. There is no direct finding that the lands of the plaintiffs in error were provided with drainage of that kind, nor that they did not need such drainage. Certain probative facts are found which tend to establish the ultimate fact, but in our opinion they fall short of that result."

The question is whether the drainage of sewage into a cesspool on that lot would be such local drainage as would exempt this property from liability for assessment for this sewer constructed on North Fourth street. From the holding of the Supreme Court, and the definition that they give of local drainage, the court thinks not. The court thinks that the city had a right

to build a sewer there that would provide this land with drainage off of the premises.

I am cited to the 4th Ohio Law Reporter, page 135, as sustaining the contention of the plaintiff. This is a recent case, decided June 2, 1906. The court says:

"We are of opinion that the premises described in the petitions herein have adequate drainage for the present without using the sewer which has been built in the street, and for which the city seeks to assess this property. The system of drainage now in use was built to the approval of the city authorities, and was the best that could be devised at the time it was built."

There they had a sewer which was built by the city authorities, and met with the approval of the city authorities.

Was the plaintiff entitled to any notice under the law as it existed at the time of the passage of this ordinance, declaring the necessity to improve and the assessing ordinance?

Section 2304 is the section of the statute which applied at that time:

"When it is deemed necessary by a city or village to make a public improvement, the council shall declare by resolution the necessity of such improvement, and shall give twenty days' written notice of its passage to the owners of the property abutting upon the improvement, or to the persons in whose names it may be assessed for taxation upon the tax duplicate, who may be residents of the county, which notice shall be served by a person designated by the council upon such person in the manner provided by law for the service of summons in a civil action, and publish the resolution not less than two or more than four consecutive weeks in some newspaper published and of general circulation in the corporation; provided, that in case of sewers, the twenty days' written notice to the owners of abutting property, or to the person in whose name the abutting property is assessed shall not be required."

The plaintiff was not entitled to any notice of the passage of the ordinance declaring the necessity to improve. And in the 9 C. C. Rep., 194, it is held that even though the statute has been amended, they would not be entitled to notice.

So the court enters a decree for the defendant.

By JUDGE CHAS. H. KIBLER: The court has not passed upon the matter of the action of the council in assessing on the whole 550 foot depth.

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The COURT: I think the testimony fails to show that the council assessed the 600 feet running along Charles street. The testimony, as I recollect it, shows that they made an estimate of the average depths of the lots. The agreement here shows that there is property south of this owned by Owens, and property still south of that owned by the Ball heirs which was in an out-lot at that time; but there is an agreement that the average depth of lots in that neighborhood, if it is the neighborhood, was 150 feet, and I do not think the council took into consideration any further assessment than on the average depth of those lots—150 feet; and if they did, it would come under the curative feature of the statute. I do not think these questions are jurisdictional to the council's action in the matter.

Charles H. Kibler, in person.

Frank A. Bolton and *Phil. B. Smythe*, for defendants.

TRANSPORTATION OF DEAD ANIMALS THROUGH A MUNICIPALITY.

[Common Pleas Court of Cuyahoga County.]

J. L. STADLER, DOING BUSINESS AS J. L. & H. STADLER, v.
THE CITY OF CLEVELAND.

Decided, December 22, 1906.

Monopoly—Authority of Municipality to Grant—Police Powers—Regulations for the Protection of the Public Health—Presumption—Injunction—Section 1536-100 (3) and Section 1536-100 (25).

1. In an action to enjoin a municipality from interfering with property rights, the presumption is that the defendant officials are acting within the scope of their authority.
2. A municipality has the power to grant a monopoly for transporting and utilizing dead animals which have not been slaughtered for food; and a demurrer to a petition for an injunction against interference with rights under such a grant will not lie where the petition alleges that carcasses which have become decayed, putrid or offensive are not transported or handled, and that such transportation and handling has at all times complied with the rules and regulations of the board of health.

BEACOM, J.

Plaintiff has for many years owned and operated a rendering and fertilizer plant and business within the city of Cleveland and now owns and operates the same. The petition says that—

“As a necessary incident to said business plaintiff buys the carcasses of dead animals from the owners thereof in and about the city of Cleveland, and removes the carcasses of the dead animals to his plant; that plaintiff is, and at all times mentioned in the petition has been, well equipped for handling the carcasses of dead animals in a sanitary and proper manner, and he does not buy, transport or handle any animals the carcasses of which have become decayed, putrid or offensive; and that in the transportation and handling of said carcasses he has at all times complied with the rules and regulations of the board of health of said city.”

The defendants are the city of Cleveland, a municipal corporation, its superintendent of police, the members of its board of public service, and its health officer.

The plaintiff complains of the defendants that they have been and now are interfering with him in the conduct of his business by refusing to permit him to take possession of and to transport to his premises dead animals purchased by him, and that they have at various times during the past year unlawfully taken such dead animals out of his possession, they being his own private property, and that they are continuing so to deprive him of possession of these carcasses of which he is the owner, and that they threaten to continue this course of conduct toward him. Plaintiff prays the court to enjoin the defendants from these acts. Defendants demur. The demurrer admits that all the allegations of the petition are true.

The powers of the defendant municipality, with which we are at present concerned, are found in Section 1536-100 (3), which grants the power “to prevent injury from anything dangerous, offensive or unwholesome,” and in Section 1536-100 (25), which grants power “to provide for collection and disposition of sewage, garbage, ashes, animal and vegetable refuse, dead animals and animal offal, and to establish, maintain and regulate plants for the disposal thereof.” Complaint having been made by petitioner against the acts of the defendant municipi-

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pality and its administrative officers, and a demurrer having been filed thereto, the question presented to the court for its determination is whether or not the municipality through its legislative body, the council, may, under the authority given in the statutory provisions just cited, grant to the defendants authority to do the things complained of. The presumption is that the defendant officers are acting within the scope of their powers; that is, that the council has authorized the doing of that which they are doing. Such is the presumption in their favor that is made on a demurrer, and that brings us to a consideration of the question whether or not the municipality has power under any circumstances to authorize the doing of the things herein complained of.

As stated in argument by counsel for both plaintiff and defendants, the court is asked herein to determine whether or not the governmental power known as the police power, which includes the power to protect public health and comfort, can be exercised so as to take from the owner of a dead animal, which has not been slaughtered for food, the possession of that animal.

The subject-matter of this case is not itself a large one, but this is the kind of question that has been involved in many of the most celebrated cases that have ever been considered by the courts. It involves the consideration of the power of society over private property for the purpose of protecting the peace and morals and health of the community. A dead animal is the subject of ownership. It is property. The petitioner has carefully averred that the animals which he owns and transports and uses have not by reason of decay become a nuisance. We then are called upon to determine whether or not the municipality could provide for the taking of a dead animal immediately upon death before there is any decay or when decay is merely incipient and depriving the owner of possession thereof.

The city may exercise the powers already referred to as given to it by the Legislature of the state, and in exercising these powers it may use every means "which are plainly adapted to an end." That was the language of Marshall, J., in *McCulloch v. Maryland*, 4 Wheaton, 316. Substantially the same language is used in 199 U. S., 306, *California Reduction Co. v. Sanitary*

Reduction Works, in which it was declared that "where a regulation by competent public authority for the protection of the public health has a real substantial relation to that object, the courts will not strike it down." The mere declaration by a legislative body that a certain thing shall be done to attain a certain end is not conclusive that it is adapted to that end. The courts always have power to determine whether or not the method sought to be used by the legislative body is "plainly adapted to the end."

The end sought to be attained by any legislation authorizing the doing of the things complained of in this petition would be the protection of public health. If the municipal council should determine that the granting a monopoly in the taking possession of and hauling away and making use of dead animals was reasonably necessary in order to prevent their becoming a public nuisance, and if a court should be of the opinion that such a provision was reasonably adapted to the end sought to be attained, to-wit, the protection of the public health, then such exercise of the police power would be a valid exercise.

In the celebrated *Slaughter House Cases*, 83 U. S., 36, the Legislature of Louisiana had granted a monopoly to a company to do all the slaughtering of animals within a certain territory, including New Orleans, and provided that animals should not be slaughtered in any other place than in those provided by the corporation to whom the monopoly was given, and the Supreme Court of the United States declared that this "was a police regulation for the health and comfort of the people within the power of the state Legislature," and further said that "The Parliament of Great Britain and the state Legislatures of this country have always exercised the power of granting exclusive rights, when they were necessary and proper to effectuate a purpose which had in view the public good, and the power here exercised is of that class."

In *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S., 306, *supra*, the facts were in substance these: The city council of San Francisco passed an ordinance granting to certain persons "the sole and exclusive right and privilege for a term of fifty years to cremate and destroy within the city and county dead animals," etc. The court declared that the city

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did have "full authority to make and enforce such reasonable sanitary regulations as have for their object the preservation of the public health. An ordinance based upon reasonable grounds for the cremation of refuse at a designated place as a means for the protection of the public health is not a taking of private property for public use without compensation. The exclusive privilege granted to a company to dispose of the garbage in the city and county of San Francisco, held not void as taking the property of householders for public use without compensation. Municipal bodies may exercise the power to provide such regulations as may be reasonably necessary and appropriate for the protection of the public health. Equally well settled is the principle that, if a regulation enacted by competent public authority avowedly for the protection of the public health has a real substantial relation to the object, the courts will not strike it down."

As to the reasonableness of the granting of a monopoly as a means of attaining the end sought, to-wit, the destruction of garbage and refuse and dead animals, the court says: "Nor can we say that the mode adopted for the suppression of the evils in question was arbitrary or did not have a real, substantial relation to the protection of the public health." The court adjudged that the ordinance was not invalid.

I am therefore of opinion that the defendant municipality does have power to grant a monopoly for the taking and transporting and utilizing dead animals that have not been slaughtered for food. What provision the city has made therefor I do not know, and it is not necessary to know for the purposes of this case, argued, as it has been, upon demurrer. The court is called upon to determine whether or not the powers which plaintiff complains the defendants are seeking to exercise could under any conditions be exercised, and this court being of opinion that they might be exercised in case the municipal council has passed or should pass appropriate legislation, the demurrer is sustained.

E. J. Hart, and W. H. Boyd, for plaintiff.

N. D. Baker, Wilcox, Payer, Wilkins & Carey, City Solicitors, for defendants.

CONSTRUCTION OF WILLS.

[Common Pleas Court of Greene County.]

EUGENE C. PORTERFIELD, ADMINISTRATOR, v. EUGENE PORTERFIELD ET AL.

Decided, February 4, 1907.

Wills—Erasures with Ink—Words “or Other Relative” Refer to Those Related by Blood and not by Marriage—Statute of Wills—Saving Clause—Nephews and Nieces as a Class.

1. A clause in a will can not be revoked by the testatrix drawing ink lines through the words. The erasure will be disregarded and such clause will be regarded as a valid part of the will.
2. Under the saving clause of Section 5971, to prevent the bequest from lapsing, the legatee included within the phrase “or other relative” must be related by blood to the testator, and not by marriage.
3. The provision of the statute of wills, Section 5971, providing against the failure of a devise, applies to nephews and nieces as a “class” as well as to children as a “class.”

KYLE, J.

This is an action to construe a will. Mrs. M. B. Conover, the testatrix, among other bequests, devised to Lucy Flint, to “brother Morgan’s wife” and to Willie Brown, \$500 each, with a residuary clause that “any money left divide equally between my nephews and nieces.” The bequest to Willie Brown or heirs of \$500 was crossed out. Below the will were two endorsements signed by the testatrix. The first one “Since Aunt Mary Morgan has died, her \$500 divide between my nephews and nieces.” The same statement follows with reference to the bequest to Lucy Flint.

The evidence shows that “brother Morgan’s wife” and “Aunt Mary Morgan” are the same person, and was Mary Morgan Brown, wife of Morgan Brown, a brother of the testatrix. Mary Morgan Brown died before the testatrix, leaving two heirs, Nellie B. Lain and William Brown. Lucy Flint died before the testatrix, leaving Weston B. Flint her sole heir.

The first question that is presented is whether the erasure of the bequest to “Willie Brown” upon the face of the will or the

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two statements below directing a different distribution of each bequest to the two persons named in the will by reason of their death, and signed by the testatrix affects the provisions of the will, or works a revocation of all or any part.

The attempted erasure of the clause in the will is to be disregarded, and the erased clause shall be regarded as a valid part of the will and the bequest go to the person as originally written in the will. *Griffin et al v. Brooks, Excr., et al*, 48 O. S., 211.

The two clauses directing a different distribution of the two bequests are not codicils, as they are not witnessed as provided by law, they can not work a revocation for that is not one of the ways provided in Section 5953, and should be disregarded. Does the legacy to Mary Morgan Brown lapse under Section 5971? She was a sister-in-law of the testatrix. The question to be determined is, does she come within the meaning of Section 5971, under the saving clause, so that her issue could take the legacy? This depends upon what construction is given the words in that section of "or other relative." If the testatrix leaves a legacy to a "child or other relative" and the legatee dies before the testatrix the legacy is saved to the issue of such persons. But must the "other relative," the legatee named, be of the blood of the testatrix? If so then as Mrs. Brown, the sister-in-law, was a relative by marriage only, that is a relative by affinity, she does not come within the terms of this statute. This precise question has not been passed upon in any adjudicated case in this state. The children of Mary Brown in this case are nephews by blood of the ancestor, but if the children of Mary Brown were by a husband other than the brother of the testatrix, such children would not be of the blood of the testatrix. In that case the property would be diverted from the blood of the ancestor.

The general policy of the law in providing for a disposition of property is to keep it within the blood of the ancestor. If the language of the statute "child or other relative" be given its natural construction such language would be held to mean that the term "or other relative" applies only to persons of the same kind of relationship to the testatrix as is sustained by a "child," that is, by blood.

The fact that the children of Mary Brown in this instance are related by blood to the testatrix could not enlarge the meaning of the term, "or other relative" in the connection in which it is used as applied to the legatee. It is the deceased legatee that must sustain a blood relationship to the testatrix in order to come within the meaning of the clause, "or other relative" in Section 5971. Mary Morgan Brown being a sister-in-law to the testatrix does not come within the saving clause, "or other relative," and her heirs are barred and the legacy to her lapses.

As Lucy Flint was a niece by blood to the testatrix her legacy will go to Weston B. Flint, her sole heir, under Section 5971, notwithstanding the statement signed at the end of the will.

Another question for consideration is how the parties take under the residuary clause, "any money left, divide equally between my nephews and nieces." Under *Wooley et al v. Parson et al*, 46 O. S., 307, it has been held that the provisions of the statute of wills providing against the failure of the devise to a child or other relative of the testator by the death of the devisee in the life of the testator (Section 5977, Revised Statutes), applies to the devise to "children" as a class.

I can see no reason why the principle announced would not be the same if applied to nephews and nieces as a "class" as well as to children as a "class." It is true that they are more remote from the testator, yet that would not affect the application of the same principles. It follows that although Lucy Flint died before the testatrix her issue takes the share of the residuum she would have taken had she survived the testatrix.

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O. R. Krickenberger, for plaintiff.

Charles Darlington, for Weston B. Flint.

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In a trial for bigamy the refusal of the court to permit a common-law wife to testify on the ground of her relationship to the defendant, is not prejudicial to the defendant when accompanied by an explicit statement by the court to the jury that no fact with reference to the alleged common-law marriage is thereby determined. 502.

The testimony of a common-law wife is incompetent against her husband on trial for bigamy in subsequently marrying another woman. 502.

COVENANTS—

A mortgage covenant which

binds the mortgagor to erect a saloon and sell exclusively beer of the mortgagee's manufacture for a period of ten years, the restriction to run with the land and making other indebtedness growing out of the business a lien on the premises, is not enforceable. 193.

DAMAGES—

A suit for specific performance brought by one who knew at the time of filing the petition that the defendant was without title, can not be retained for assessment of damages. 126.

For wrongful death will not be allowed, where the jury based their verdict on a conjecture as to negligence on the part of the defendant. 249.

DEBENTURES—

Relation of purchaser to company issuing them; where the purchaser becomes a member of the corporation and a part owner and participates in the profits, the provisions of Section 4271 for the recovery of money lost in lotteries are not available to him. 281.

DEBTS AND LIABILITIES—

Checks against a bank deposit do not relieve the deposit from taxation, unless they have been presented for payment, or certified, or the bank has in some other way become irrevocably committed to the holders for their payment. 297.

DEED—

Restrictions in, which forbid the erection of any building upon the ground conveyed except of a certain kind; building of an apartment house is a violation of a restriction which requires the grantee to use the lot for residence purposes only; requirement that the front of any building erected on the lot shall not be nearer to the street than the house next east, construed; injunction will lie to restrain violation of restrictions. 65.

The use of the word "heirs" or

other words of perpetuity in a trust deed are not necessary to vest a fee simple title in a trustee, when; omission to name successors without significance, when. 90.

A deed to her daughter by a claimant of title, with a reservation of a life estate, is not an eviction of the lessee or breach of covenant for his quiet enjoyment. 265.

Expressions in, which will be construed in favor of a grantee resisting a street assessment. 411.

DEFENSES—

An allegation that a plaintiff, suing for recovery of money paid for certificates of debenture, has shared in the distribution of the assets of the company by the receivers, if proven constitutes a *pro tanto* defense, and also states the further defensive fact that the plaintiff was a part owner of the business. 281.

DELEGATION OF DUTIES—

A contract for a street improvement which provides that the work shall be done to the satisfaction of the city engineer or paving committee does not exhibit such a delegation of power as to render the contract void. 317.

A board of directors do not delegate their powers by making the corporation a member of an organization of corporations, firms and individuals, formed not for profit, but for mutual protection of the interests of the members and their employees. 554.

DEPOSITORIES—

Where public funds are deposited without authority of the depository law, a bank receiving such funds with knowledge of their character may be required to account for the interest earned by such funds while on deposit. 245.

The prosecuting attorney of the county has authority to bring an action for recovery of interest earned on public deposits. 245.

The county depository act (98 O. L., 274) is constitutional; spirit of the act with reference to keeping the public funds in the county to which they belong; banks which are eligible as bidders for the use of such funds. 481.

DEVISE—

Where the executor is the sole devisee, and stock in an insolvent corporation comes into his hands which is not specifically mentioned in the will and is not accepted by him, a claim of statutory liability will not lie against such devisee individually. 113.

To directors of a county infirmary for the benefit of inmates of the infirmary. 394.

DIRECTORS—

See Corporations.

Do not surrender their powers by the corporation becoming a member of an organization for the mutual protection of the interests of its members and their employees. 554.

DISBARMENT—

Charges against an attorney of unprofessional conduct are insufficient upon which to base suspension from office or disbarment, unless involving moral turpitude within the lines of professional duty; pleading in disbarment proceedings. 129.

DISCRETION—

Of the board of public service in choosing material for street paving, from material named by council in the alternative, can not be interfered with by the courts. 1.

Of the board of public service in awarding a contract for a street improvement to another than the lowest bidder can not be interfered with except for collusion or such gross carelessness as amounts to fraud. 1.

A common pleas judge is without discretion to permit an inspection of the minutes of the grand jury or any disclosure of

its proceedings, except in the actual trial of the case where the testimony of a witness is in issue. 79.

Of officials as to whether vessels and fixtures are being used in the unlawful sale of intoxicating liquor and ought to be seized and destroyed can not be interfered with by injunction. 239.

A fine of \$50 imposed on a second-hand dealer for failure to keep certain articles on hand for thirty days is not an abuse of discretion on the part of the trial court. 398.

DITCHES—

County commissioners without authority to convert a living stream of water into a ditch by proceedings for locating and constructing a ditch. 149.

Section 4483 does not authorize the deepening, widening or straightening of a water-course by county commissioners, upon petition of a mayor acting under resolution of a municipal council in that behalf. 185.

The bond for a ditch improvement must follow the requirements of Section 4451, and confers no jurisdiction unless. 185.

Several joined in one improvement; questions relating to bond for costs; view of the line of the ditch, by the commissioners; injunction will not lie against the improvement, when; benefits; injury to lands; character of the improvement. 545.

DIVIDENDS—

Deferred dividends arising on life rate endowment policies of a life insurance company are taxable in the hands of the company. 297.

A dividend legally declared becomes a debt of the company to the stockholder as an individual to be paid within a reasonable time, and as such debt is beyond the control of either the stockholders or directors; whether or not the directors have acted within the scope of their authority in

declaring the dividend is for the court to determine in a proper case. 609.

DIVORCE AND ALIMONY—

The obtaining of a decree of divorce by a husband in another state does not bar the wife of the right of recovery in this state of money expended by her in the support of their children prior to the granting of the decree; nor can aggression on her part be inferred as a matter affecting the rights of the children, where the decree made no provision for alimony or for the children. 142.

A suit for divorce and alimony brought by a wife against her husband who was "not found" under the first summons which was issued, but who had knowledge of the filing of the suit, is pending with reference to property interests, when. 427.

An order giving to a divorced mother the custody of her minor child is annulled by the death of the mother. 566.

A divorced woman is not entitled to homestead exemption. 631.

DOMICILE—

The domicile of a parent or one standing in the relation of a parent to a minor is the domicile of the minor. 233.

DOWER—

Effect of amicable partition on inchoate right of dower; mortgage to equalize allotments (the wife not joining) subordinate to inchoate right of dower. 405.

EJECTMENT—

Action in, as to strip of land where the boundary line was in dispute. 465.

ELECTIONS (Political)—

The annexation to a municipality of territory which has been voted "dry" at a Beal law election does not change the character of such territory with reference to the sale of intoxicating liquor, and the holding of a Brannock

law election in such territory within two years of the date of the Beal law election is invalid. 417.

In an action to contest an election, where the election officers are *functus officio*, the fact that none of the ballots in dispute were counted may be established by parol evidence. 956.

A ballot is not voted until it is deposited in the ballot box; ballots which are irregularly marked; how counted; markings which do not render the ballot void; mutilated ballots. 596.

Where the term of office begins before a case to contest the election is brought to trial, a finding in favor of the contestant should be accompanied by a judgment of ouster and of induction of the contestant into office. 596.

How an appeal shall be perfected in a contest for a county office. 596.

ELECTRIC RAILWAYS—

See Street Railways.

ELECTRIC WIRES—

See Telegraph and Telephone.

The granting to an electric light company the right to place its wires on municipal poles is *ultra vires*. 329.

Are electric light poles personal property? 329.

EMBEZZLEMENT—

Allegations of ownership in an indictment charging embezzlement of funds bequeathed to the directors of a county infirmary for the benefit of the inmates of the infirmary. 394.

ERROR—

Common pleas has jurisdiction under Section 6708 to consider errors of fact not appearing on the record from the court below, but this jurisdiction is limited to facts of which the record is not compelled to speak. 55.

It is an error to permit the ex-

pression of an opinion on the part of a witness concerning a matter which is not susceptible of expert testimony. 122.

In an action for damages on account of wrongful injury of a minor, it is error to instruct the jury as to special damages when the petition does not allege nor the evidence show special damages; and so as to time lost and diminished earning capacity when there is no evidence relating thereto, and no evidence of the emancipation of the minor. 122.

The right of a defendant in a criminal case to prosecute error is in nowise prejudiced by the failure of the mayor, before whom the trial was held, to transmit to the common pleas the papers in the case within ten days after the allowance of the bill of exceptions. 339.

Where there has been a denial of a constitutional right, the law will presume an injury has been sustained, and the rule that a reversal will only be granted for errors which are material or prejudicial, will be disregarded. 401.

The exclusion from the jury wheel of the names of all persons of African descent, where such exclusion was made solely on account of race or color, is a denial of the equal protection of the laws as vouchsafed by the Fourteenth Amendment. 401.

The denial of a public trial is a denial of a constitutional right, and is ground for the reversal of the resulting judgment. 401.

ESTOPPEL—

The obtaining by the husband of a decree of divorce in another state after a long separation does not estop the wife from recovering from him for money expended in the support of their children prior to the granting of the decree. 142.

A successor to the title of a lessee long subsequent to the execution of the power of alienation, paying rent to the present claim-

ant of title for a period of years, attorns to her as the reversioner and is estopped from denying her title. 265.

Application of, where a contractor is suing for pay for making a street improvement. 317.

Can not be pleaded by an electric light company against a municipality demanding that the wires of the company be removed from municipal poles. 329.

Against contesting a street assessment will not be inferred as to a grantee who purchased subsequent to the making of the levy, unless. 411.

EVIDENCE—

In support of a claim that the note sued on was executed as a mere acknowledgment of a gift, and not as a promise to pay, must be clear and convincing. 25.

In a suit on a note which is set out in the petition, parol testimony is not admissible in support of averments of the answer which if sustained would go no further than to vary the written agreement. 25.

A matter not susceptible of expert testimony should be determined by the jury from the evidence, without expression of opinion on the part of the witness. 122.

Necessary evidence upon which to base a claim for time lost and diminished earning capacity of an infant who has wrongfully suffered an injury. 122.

Declaration of a purchaser of liquor under a physician's prescription in a dry town, as to what he wanted the liquor for, not competent against the physician when made in his absence. 277.

Expert evidence may be properly admitted in a criminal trial, where the charge is gambling by means of the game known as "craps." 401.

In support of a petition for a reduction of a street assessment will be resolved against the plaintiff

when of such a character as to leave the court in doubt as to the value of the abutting property before and after the making of the improvement. 411.

The testimony of a common-law wife is not competent against her husband on trial for bigamy in subsequently marrying another woman. 502.

Where the only rational view which can be taken of plaintiff's evidence is that it has not proved anything, a motion to direct a verdict for the defendant should be granted, notwithstanding the scintilla rule. 529.

Evidence and proof distinguished. 529.

In support of the claim that the defendant is engaged in the sale of intoxicating liquors. 577.

As to existence of a parol lease admissible, when. 583.

In an action to contest an election, where the election officers are *functus officio*, the fact that none of the ballots in dispute were counted by the election officers may be shown by parol evidence. 596.

EXAMINATIONS—

Report of committee appointed to examine county commissioners' annual report need not be published in tabular form and should be paid for at the one-price rate only. 35.

EXECUTOR—

See Administrator.

EXCEPTIONS—

The exception which saves the holders of a meritorious claim from unnecessary and perhaps fatal delay, does not permit the insolvency of a consolidated company being pleaded in a suit by a holder of bonds of a constituent company not yet due, where the suit is for enforcement of statutory liability. 31.

Building of an apartment house a violation of a restriction in a deed which requires the grantee

to use the lot for residence purposes only. 65.

To the rule as to the use of words of inheritance and words of limitation in a deed. 90.

EXEMPTIONS—

Where a debtor earning \$60 a month gives \$15 of it to his wife, which she uses in payment of dues to a building association on a loan used in building the house in which they live, the money thus paid will be regarded as rent and beyond the reach of creditors under the exemption laws; but money previously paid by the husband out of his earnings for the lot on which the house stands is not exempt, and the property to the extent of such payments is liable for his debts. 260.

A divorced woman is not a "widow" within the contemplation of the statute allowing homestead exemption to insolvent debtors with families or other dependents. 631.

FENCE—

Value of ancient fences as establishing boundaries where the original monuments have disappeared. 465.

FINAL ORDER—

A finding that it is necessary to appoint a guardian is not a final order, and appeal will not lie until an appointment has been made. 358.

An order appointing a stranger guardian of a minor child is a final order affecting a substantial right of his father. 566.

FORFEITURE—

Of contract for sale of real estate, where the purchaser has been placed in possession and is in default for payment; purchaser can not be treated as a tenant liable for rent unless he assent thereto. 638.

FORCIBLE ENTRY—

In a forcible entry and detainer proceeding the terms of a parol

lease may be shown by evidence as to the parol agreement between the parties. 583.

FRANCHISES—

For the use of the streets of a city by a telephone company in constructing its lines; function of the probate court with reference to granting; can not limit duration of the franchise; nor make provision for extraordinary uses of the streets, such as the moving of buildings. 624.

FRAUD—

A fraudulent entry by the cashier of a bank in favor of a building association of which he was treasurer, on the faith of which the building association declared and paid a dividend, held to give the association no right of action against the bank. 587.

FRAUDULENT CONVEYANCE—

Made for the evident purpose of defeating a suit for alimony; grantee in a fraudulent conveyance will be protected to the extent of money actually paid, when. 427.

GAMBLING—

The provisions of Section 4271, for recovery of money lost in lotteries, are not available to a purchaser of certificates in a debenture company, when the purchaser becomes a member of the corporation and participates in the profits; allegations constituting a defense to such action; statute of limitations begins to run, when. 281.

Expert evidence may be properly admitted as to gambling by means of the game of "craps." 491.

GRAND JURY—

Not within the power of discretion of a common pleas judge to permit an examination of the minutes of, or any disclosure of the proceedings before, except in the actual trial of the case where the testimony of a witness is a matter of issue in determining the facts of the case. 79.

GRANTOR AND PURCHASER—

A purchaser can not enforce a contract for the purchase of land against one who is without title to the land; nor can the suit be retained for the purpose of assessing damages where it appears that the plaintiff knew of the lack of title at the time of the filing of the petition. 126.

GUARDIAN AND WARD—

See Infant.

The residence of a minor is determined by the residence of his parent or some one standing in the relation of parent; where a father dies at the residence of his father, and the child continues to reside with his grandfather, the residence of the grandfather becomes the residence of the minor within the meaning of Section 6254. 233.

The word "resident" as used in Section 6254, relating to the appointment of guardians by the probate court, means "domicile." 233.

A finding as to the necessity for the appointment of a guardian is not a final order, and appeal will not lie until an appointment has been made. 358.

A guardian, removed by the probate court for lack of jurisdiction to make the appointment, is not a party in a fiduciary capacity, and does not appeal in the interest of the trust, and must file bond in order to perfect his appeal. 449.

A father is by law and nature the guardian of his minor child; where cause exists for the appointment of a guardian, it must be shown that the father is an unsuitable person before another can be appointed. 566.

An order by the probate court appointing a stranger as guardian of a minor child is a final order affecting a substantial right of the father, and is reversible on error. 566.

HEALTH—

An order by a board of health that milk of a higher temperature than fifty degrees Fahrenheit shall be confiscated, forfeited and immediately destroyed by direction of the health officer or milk inspector, is not in violation of constitutional rights. 507.

Police power with reference to regulations for protecting the public health; utilization within a municipality of dead animals not slaughtered for food. 649.

HOMESTEAD—

A divorced woman is not a "widow" within the contemplation of the statute allowing homestead exemption to insolvent debtors with families or other dependents. 631.

HUSBAND AND WIFE—

The dissensions of parents do not release a father from the obligation to support his children; the obtaining of a decree of divorce by the father in another state, after a separation of many years, does not bar recovery by the mother from him of money expended by her in the support of their children prior to the granting of the decree; aggression on her part can not be inferred as a matter affecting the rights of the children, when. 142.

A wife can not be compelled to pay counsel fees due from her husband and earned in an action brought by him to wrest from her an interest in land to which he lays claim. 255.

Where a husband earning \$60 a month gives \$15 of it to his wife, which she uses in paying dues to a building association on a loan which was used in building the house in which they live, the payments thus made by her will be regarded as rent and exempt from his creditors; but previous payments by him out of his earnings for the lot on which the house stands are not exempt, and the

property to the extent of such payments by him is liable for his debts. 260.

Suit by wife for divorce and alimony; husband transfers for an inadequate consideration property described in the petition, having knowledge of the filing of the suit but before service is obtained upon him; conveyance treated as fraudulent and title decreed in the wife. 427.

The testimony of a common-law wife is incompetent against her husband on trial for bigamy in subsequently marrying another woman. 502.

A divorced woman is not a "widow" within the meaning of the statute providing homestead exemption. 631.

INFANT—

See Guardian and Ward.

Wrongful injury of; elements upon which to base damages there is no evidence relating thereto time lost and diminished earning capacity erroneous, when there is no evidence relating thereto and no evidence of the emancipation of the minor. 122.

A minor can not change his domicile, but it is determined by the residence of his parent or some person standing in the relation of parent to him; an infant who has been domiciled with his grandfather, but goes to live with an aunt in another county, remains a resident of the county in which his grandfather resides. 233.

Where a necessity exists for the appointment of a guardian for, it must be shown that the father is an unsuitable person before a stranger can be appointed. 566.

An order giving the custody of a minor child to its divorced mother is annulled by the death of the mother. 566.

INFIRMARY—

Bequest to directors of, for the benefit of inmates of. 394.

Contested election of infirmary

director; induction of the contestant into office. 596.

INJUNCTION—

Will lie against the building of an apartment house on a lot the deed to which requires the grantee to use it for residence purposes only. 65.

Conduct on the part of strikers against which injunction will lie; will not lie against the peaceable enticement of employees to leave their employment when they are not under contract to remain. 161.

Will lie against the enforcement of a covenant in a mortgage contract requiring the mortgagor to erect a saloon and buy beer exclusively from the mortgagee for a period of ten years, the covenant to run with the land and unpaid accounts for beer to be a lien on the premises. 193.

Will lie against the use by a railroad company of the streets upon which rest the piers, abutments or supports of an overhead structure, where such use will interfere with the ordinary use of such streets by the public. 217.

Will not lie to prevent an unwarranted seizure of vessels and fixtures alleged to be in use in the unlawful sale of intoxicating liquor. 239.

The surety under a temporary injunction bond in a case which is not prosecuted is liable, whether the action is dismissed at the request of the plaintiff or because of his failure to prosecute. 273.

Will lie on the petition of a township board of education, seeking to prevent interference with the township schools by the county commissioners, when. 433.

Will lie under the petition of a tax-payer to restrain an issue of street intersection bonds, exceeding one per cent. of the taxable property of the municipality for that year. 476.

Will lie against county commissioners and a county treasurer to

prevent county funds being placed under the county depository act in a bank not having its situs in the county. 481.

Will lie to prevent the exclusive use of streets for supports for an overhead railway structure. 497.

Against an issue of street, sewer or intersection bonds to be paid for by a general tax upon all the property within the corporation and exceeding in amount one per cent. of the tax duplicate for that fiscal year. 513.

Will not lie against the improvement of a public ditch, when. 545.

Will not lie to prevent the sale of household goods levied upon under distraint for failure to pay liquor tax. 577.

Will lie to restrain the placing of a water meter on a service pipe leading to a private residence, when. 593.

Against the collection of a sewer assessment. 641.

To prevent interference with property rights by municipality; presumption. 649.

INSURANCE, CASUALTY—

It is competent for a corporation in Ohio to become a member or stockholder of a mutual insurance company or association for the purpose of its own protection; an assessment against a corporation may be collected. 104.

INSURANCE, FIRE—

Provision for an appraisalment in case of loss is a matter of mere detail of proof as to the amount to be recovered, and does not touch the fundamental right of recovery; power of contracting parties with reference to appraisalment becomes *functus officio*, when. 41.

The provision of a fire insurance policy limiting the time within which a suit can be brought thereon to six months after the fire, is valid in the absence of circumstances indicating that the

effect of the limitation upon the insured is harsh and oppressive. 229.

The burden is on the one complaining of such a rule to show that its effect is such as to demand that its operation be suspended. 229.

Where fire resulted from the negligent operation of a railway; action against the railway company by the insurance company compelled to pay the loss. 373.

The provisions of the Valentine Anti-trust law apply to the business of fire insurance; an indictment which charges the defendants with conspiring to restrict the business of fire insurance, increase rates and prevent competition, charges a crime under the laws of Ohio. 377.

INSURANCE, LIFE—

Vested interest of beneficiaries; concurrence of beneficiaries a condition precedent to valid action on the part of the insured of the nature of treating the contract as rescinded and for the recovery of premiums paid; nor can such an action be maintained without concurrence of the beneficiaries where based upon a wrongful refusal of the company to receive further premiums or to continue the policy in force. 97.

Construction of a contract whereby one was to be paid a commission on "the first installment of premium" paid on a policy of life insurance by an insured who was recommended to the agency by the party of the first part. 294.

Unconstitutionality of Section 283 suggested. 294.

Accumulated deferred dividends or undivided profits arising on life rate endowment policies are not, under the laws of Ohio, legal *bona fide* debts owing by the company, and can not be legally deducted from the company's credits in making up its tax return; neither can the re-

serve fund be so deducted; nor bank deposits which have been checked against, but the checks not presented for payment or certified by the bank, or the bank otherwise irrevocably committed to the holders for their payment. 297.

INTEREST—

Where public funds are deposited without authority of the depository law, a bank receiving such funds with a knowledge of their character may be required to account to the public for the interest earned by such funds while so deposited. 245.

INTERURBAN RAILWAYS—

See Street Railways.

JONES LAW—

See Liquor Laws.

JUDICIAL ACTS—

Duties of a township board of education which are judicial and with which the county commissioners are without authority to interfere. 443.

JUDGMENT—

A judgment is a final determination of the rights of the parties to the action. It affirms that a legal duty or liability does or does not exist, and can be granted for no other purpose. 571.

Special or qualified judgments are unknown in Ohio. 571.

JURISDICTION—

Of the common pleas as to errors of fact not appearing in the record from a mayor's court and of which the record was not compelled to speak. 55.

A court of equity has no jurisdiction over a foreign corporation, where the *res*, with reference to which relief is sought, is in another jurisdiction and no decree can be made effective against it. 155.

A court of record has complete jurisdiction and inherent power

to punish strikers for contempt, when; the only question on review in such a case is whether the evidence sustains the judgment which was rendered. 161.

Not conferred upon county commissioners in the matter of a ditch improvement, unless the bond follows the requirements of Section 4451 and is signed by at least two sufficient sureties. 185.

Of probate court to appoint a guardian for a minor who has been domiciled with his grandfather, but has lately been taken to another county to live with his aunt. 233.

Facts necessary to give council jurisdiction to proceed with a street improvement. 317.

On appeal by a guardian from an order by the probate court removing him for lack of jurisdiction to make the appointment. 449.

Of county commissioners and township trustees in the matter of effecting the incorporation of a village; when the county commissioners alone may act. 561.

JURY—

The exclusion from the jury wheel of all names of persons of African descent is a denial of the equal protection of the laws as vouchsafed by the Fourteenth Amendment, where such exclusion is based solely upon race or color. 401.

LABOR UNIONS—

Are acting within their rights in peacefully persuading employes to quit their employment when not under contract to remain; the giving of railroad tickets to such employes and money to pay the traveling expenses of themselves and families to another city is not unlawful persuasion and not a contempt against a previous order of court enjoining unlawful persuasion. 161.

The motive in inducing employes to leave their employment is immaterial, when. 161.

LANDLORD AND TENANT—

A verbal lease for a term not exceeding three years, when accompanied by possession, is taken out of the statute of frauds; duration and terms of a parol lease may be shown by evidence of a verbal agreement between the parties. 583.

A defaulting purchaser of land who is in possession, is a trespasser under claim of title, and the seller can not effect a forfeiture of the contract of purchase by mere service of notice on the purchaser and thereafter treating him as a tenant liable for rent unless assent on his part to be so regarded can be shown. 638.

LAW AND FACT—

The questions of negligence in permitting a bank book to be stolen, and of payment by the bank of the deposit to the wrong person are for the jury under all the circumstances of the case. 22.

A successor to the title of a lessee long subsequent to the execution of the power of alienation, by entering upon the estate and paying rent to the present claimant of title for a period of years, has attained to the reversioner and is estopped from denying her title. 265.

A subsequent conveyance by the claimant to her daughter, with a reservation of a life estate, was not an eviction or breach of warranty for quiet enjoyment. 265.

A lessee from an assignee is a surety, and the lessor has his remedy against either. 265.

Assumpsit may be employed to recover installments of rent as they become due under a contract to pay by installments. 265.

A verbal lease for a term not exceeding three years, when accompanied by possession, is taken out of the statute of frauds; the duration and terms of a parol lease may be shown by evidence of the verbal agreement between the parties. 583.

LEGISLATIVE POWER—

See Constitutional Law.

The designation by council of material for street paving in the alternative, with the right in the board of public service to choose from the materials named is not a surrender of legislative power. 1.

The provision of Section 283, relating to the licensing of agents and solicitors of life insurance, do not apply to one who for a consideration recommends an insurance agency to one who wishes to take out a policy. 294.

Unconstitutionality of Section 283 suggested. 294.

LIMITATION OF ACTIONS—

An action by a purchaser of debenture certificates for recovery of the money paid is barred if not brought within one year from the time the cause accrued. 281.

The statute begins to run as to a claim for unpaid stock subscription from the appointment of a receiver or other act of insolvency on the part of the corporation. 113.

LIMITATIONS—

The provision of a fire insurance policy, limiting the time for bringing a suit thereon to six months after the occurrence of the fire, is valid in the absence of a showing that the effect of the limitation is harsh and oppressive on the insured; burden of showing such effect is on the insured. 229.

Upon the bonding power of municipalities. 476.

LIQUOR LAWS—

Seizure under the Jones law; a court will not undertake to determine in advance whether or not vessels and fixtures are being used for the unlawful sale of intoxicating liquor, as alleged by municipal officers; remedy of one threatened with a wrongful seizure of vessels and fixtures. 239.

Prosecution of a physician as aider and abettor of the sale of intoxicating liquor in a dry town by giving prescriptions for liquor which was purchased at the drug store; declaration of purchaser to druggist as to what he wanted the liquor for, incompetent against the physician in his absence. 277.

Employment and payment of detectives by mayor to secure testimony for use in prosecution for liquor selling does not disqualify mayor from sitting at the trial of the case; nor is a mayor disqualified by reason of opinions he may entertain regarding the offense. 277.

Failure of the mayor to transmit to the common pleas the papers in a case tried by him within ten days after the allowance of the bill of exceptions, does not prejudice the accused in his effort to prosecute error to the higher court. 339.

The giving away by a traveling salesman for a liquor house of samples in "dry territory," about a teaspoonful in each instance, is a giving away of intoxicating liquor as a beverage. 339.

When an election has been held in a municipal corporation, under the provisions of the Beal law, which resulted in favor of the prohibition of the liquor traffic therein, such prohibition continues in force, notwithstanding the annexation of the entire territory composing such municipality to another corporation in which no election has been held under the provisions of said law. 417.

An election held under the residence district local option law, known as the Brannock law, within a part of the territory which formerly constituted a municipal corporation in which a Beal law election has been held, and within two years of the date of such Beal law election, is invalid. 417.

Local option in its legal and practical aspects is above municipal regulation, a creature of the

state and the will of the voters. 417.

Where a liquor tax has been regularly entered by the county auditor, the burden is upon the one so assessed of proving that he was not engaged in the liquor business at the time covered by the assessment. 577.

A traffic in intoxicating liquors may be carried on without maintaining a bar or keeping a stock of liquor constantly on hand, and one who sells four bottles of beer at a profit will be regarded as engaged in the liquor business, when. 577.

The fact that no demand was made at the seller's place of business for payment of the liquor tax becomes immaterial after a levy has been made on the chattels for failure to pay the tax and the parties are before the court. 577.

Penalties for failure to pay a liquor tax are assessed by way of punishment and can not be refunded. 577.

LIS PENDENS—

An action for divorce and alimony against a husband who is "not found," but who has knowledge of the bringing of the suit, is *lis pendens* with reference to property interests, when. 427.

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Applies to street and sewer "intersection" bonds. 476.

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The surety on the bond of a public official is not answerable for malfeasance of the official in the performance of duties not imposed by law. 145.

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To compel the levying of an assessment or tax to pay a contractor for work done for the municipality is not available, until it appears that the contractor has obtained a judgment and it can not be enforced by execution. 317.

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Evidence sufficiently establishing a common-law marriage to support a conviction of bigamy. 502.

MASTER AND SERVANT—

An organization of corporations, firms and individuals, not for profit, but for the mutual protection of the interests of the members and their employes, is lawful. 554.

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Jurisdiction of the common pleas to consider errors of fact not appearing on the record, but of which the record is not compelled to speak; when the challenge is as to facts which should appear in the record, the record should be corrected in the court making it. 55.

Not disqualified from trying a liquor selling case by reason of his opinions regarding the offense; nor by reason of his having employed and paid detectives to obtain testimony for use in the prosecution of offenders. 277.

Failure of, to transmit to the common pleas, within ten days from the allowance of the bill of exceptions, the papers in a case under the local option law, can in no wise prejudice the accused in seeking to prosecute error to a higher court; provisions of Section 6565 are sufficiently complied

with, if a time is fixed at the close of the trial for the allowance of the bill. 339.

MILK—

An order by a board of health that all milk of a higher temperature than fifty degrees Fahrenheit shall be confiscated, forfeited and immediately destroyed under the direction of the health officer or milk inspector, is not in violation of constitutional rights. 507.

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Duties of a township board of education which are ministerial; circumstances under which these duties may be performed by the county commissioners. 443.

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Of members of the Toledo ice trust, in entering pleas of guilty, as to the attitude of the court with reference to the nature of the offense committed and the degree of punishment which would be imposed, not ground for vacation of the sentence pronounced. 361.

MONOPOLY—

If a contract is in partial restraint of trade, it can not be enforced unless it appears from the pleadings and the evidence to be founded upon a valuable consideration and to be reasonable and not oppressive. 193.

A mortgage contract which stipulates that the mortgagor shall erect a saloon and sell the beer of the mortgagee exclusively for a period of ten years, the covenant to run with the land and unpaid accounts for beer to be a lien on the premises, is unreasonable and oppressive and lacking in mutuality, and injunction against the sale by the mortgagor of beer of other manufacture will not lie. 193.

Penalty clause of the Valentine Anti-trust law not unconstitutional.

al; sentence imposed on members of the Ice trust in Toledo. 361.

The provisions of the Valentine Anti-trust law include the business of fire insurance, and an indictment which charges the defendants with restricting the business of insuring property, the fixing and increasing of premiums therefor and the prevention of competition, charges a crime under the laws of Ohio. 377.

A municipality has the power to grant a monopoly for transporting through the streets and utilizing dead animals which have been slaughtered for food. 649.

MORTGAGE—

A restriction in, requiring the mortgagor to erect a saloon and sell exclusively for a period of ten years beer of the mortgagee's manufacture is not enforceable. 193.

Money in the hands of an administrator derived from the sale of mortgaged premises and awaiting payment to the mortgagees is subject to taxation. 214.

Where given by one tenant in common (his wife not joining) to equalize the allotments in an amicable partition, is subordinate to inchoate right of dower. 495.

MOTIVE—

The motive of labor unions or of strikers in persuading employees to leave employment when not under a contract to remain, is immaterial. 161.

MUNICIPAL CORPORATIONS—

Discretion of the board of public service in awarding a contract for a street improvement to another than the lowest bidder can not be interfered with, except for fraud or such gross carelessness as amounts to fraud. 1.

Council may select material for improving street in the alternative, and board of public service may decide as between the materials named by council; discretion thus exercised can not be interfered with by the courts; asphalt

not a patented article and not under exclusive control of any company or trust. 1.

Municipality not liable for errors of judgment of engineers or officers in determining upon a sidewalk improvement which afterward results in injury to a pedestrian. 57.

What the testimony must establish in order to render a municipality liable to a pedestrian injured upon a sidewalk rendered slippery by mud. 57.

There is an entire absence of power in council, under the statutes as they exist to-day, to authorize the erection of any structure, abutment or support in a public way, which will necessarily prevent a joint use by the public of the part so occupied. 217.

But even were power lodged in council to grant some use of the streets to railroads for the support of overhead structures, such power could not be abused by council, and if exercised to such an extent as to interfere with the ordinary rights of the public in and to the ordinary use of such streets, a court will interpose by injunction. 217.

A contract for a street improvement, which provides that the work shall be done to the satisfaction of the city engineer or paving committee does not exhibit such a delegation of power as to render the contract void. 317.

If the essential facts necessary to give council authority to proceed with a street improvement are stated in a petition for such improvement, other recitals included therein will be treated as mere surplusage and the petition allowed to stand. 317.

Facts necessary to give council jurisdiction to proceed with a street improvement. 317.

The act of April 4, 1900, relating to the improvement of streets in cities of the fourth grade of the second class is unconstitutional

for lack of uniformity of operation; but a petition, evidently drawn with reference to the provisions of this act, is still good against demurrer when its allegations bring it within the general laws on that subject. 317.

One who holds a claim against a municipality can not resort to mandamus to compel the levying of a tax or assessment for its payment, until it appears that his claim has been reduced to judgment which can not be enforced by execution. 317.

A public lighting company acquires no right to maintain its wires on municipal poles by estoppel, where it has been charged from the beginning with full knowledge that whatever rights it acquired to the use of the poles must be by strict legal contract with the city. 329.

There is an entire absence of power on the part of a municipality to grant to a public lighting company the right to joint use of municipal poles; to treat such rights as a mere license might result in confiscation of municipal rights which will be needed in the future. 329.

Power of a municipality to sell real or personal property; are electric light poles personal property? 329.

Where a municipality in which the liquor traffic has been prohibited at a Beal law election is annexed to a municipality in which no such election has been held, the status of the territory constituting the first municipality remains "dry," and an election held therein under the provisions of the Brannock law within two years of the holding of the Beal law election is invalid. 417.

Local option is above municipal regulation, a creature of the state and the will of the voters. 417.

Intersection bonds, issued to pay the corporation's share of street and sewer improvements, to be

paid by general taxation upon all the property within the municipality, come within the restrictions of the Longworth act, restricting bond issues to one per cent. during any one fiscal year, without submitting the question to a vote of the people. 476.

A municipal corporation may, as an abutting owner, give a valid consent to the granting of a street railway franchise. 493.

A municipal council is without power under existing laws to authorize a railroad company to occupy a street or public landing with an overhead structure, resting upon fixed permanent supports necessarily involving the exclusive use of the ground so occupied. 497.

The authority of council to order an issue of bonds for street or sewer improvements or intersections, where to be paid by a general tax on all the property of the corporation, is limited by the restrictions of the Longworth act and Section 100 of the municipal code, unless the question of the issue has been submitted to the voters and approved by them. 513.

Council empowered to fix rules and regulations for the use of water by consumers; an injunction will lie against the placing of a meter in a residence, against the wish of the owner and in the absence of any evidence of waste or improper use of water, when. 593.

The moving of a building across or along a street is not a public use of the street, but is a use which may be made lawful by ordinance prescribing the manner of such moving. 624.

In an action to enjoin a municipality from interfering with property rights, the presumption is that the defendant officials are acting within the scope of their authority. 641.

A municipality has the power to grant a monopoly for transporting through the streets and utilizing

dead animals which have not been slaughtered for food. 649.

MUTUALITY—

Want of, in a mortgage contract. 193.

NECESSARIES—

See Attachment.

NEGLIGENCE—

Contributory negligence should not be imputed to one who passed around the rear end of a street car from which he had just alighted, and was struck by a rapidly moving car running on the parallel track in an opposite direction and which he could neither see nor hear. 13.

In permitting a bank book to be stolen; in the payment by a bank of a deposit to the wrong person. 22.

Where a plaintiff had full knowledge that a sidewalk had been rendered slippery by a hard rain washing mud upon it, and he could easily have avoided the dangerous place, but went upon it and fell, contributory negligence is shown which warrants the taking of the case from the jury. 57.

Injury of an infant; elements upon which to base damages; matters not susceptible of expert testimony; speculative damages. 122.

A verdict for damages for wrongful death will be set aside where the only evidence of negligence is an inference drawn from circumstances, and a still stronger inference of the absence of negligence may also be drawn from circumstances clearly proven. 249.

Where two acts of negligence are alleged, and these unite in causing an injury, it is not a question of proximate or remote cause, but of concurring causes, for both of which the defendant may be responsible, and the one injured may allege both and prove both if he can. 373.

The pleading of facts is not open to objection in an action for negligence, where the pleader is

thereby relieved from the necessity of pleading conclusions as to the concurrence of negligence or the non-concurrence of contributory negligence. 373.

Where contributory negligence is pleaded as a defense, the defendant may be required to set out the acts of negligence on the part of the plaintiff upon which he relies. 542.

NOTICE—

Correspondence between creditor and surety such as was had in this case with reference to urging the maker of a note to pay it, does not amount to such notice to the owner to bring suit thereon as will relieve the surety under Section 5833. 49.

Effect of constructive notice upon a husband of the filing of a suit against him for divorce and alimony, wherein a specific piece of property was described. 427.

Of claim of adverse possession as shown by a permanent building. 465.

To land owners as to intention to construct a public ditch. 545.

Of meeting of the directors of a corporation. 609.

A property owner is not entitled to written notice of the passage of an ordinance providing for the construction of a sewer in the street upon which his property abuts. 641.

NUISANCE—

Things which are a nuisance by nature and those which become a nuisance by the manner in which they are used; unwholesome food is a nuisance *per se*, and an ordinance providing for its immediate destruction is not in contravention of constitutional guaranties. 507.

OFFICE AND OFFICER—

A bond for the faithful performance of official duty binds the surety as to official duty only, and not for malfeasance in the performance of duties not imposed by law. 145.

The discretion of officers charged with the duty of seizing vessels and fixtures used in the unlawful sale of intoxicating liquors can not be interfered with by injunction. 239.

Where the term of office begins before a contest for the office has been brought to trial, a finding in favor of the contestant should be accompanied by a judgment of ouster and of induction of the contestant into office. 596.

ORDERS AND DECREES—

See Judgment.

ORDINANCE—

Granting the right to occupy portions of a street or public landing with permanent supports for a railway viaduct or overhead structure is void under existing laws. 497.

Regulating the temperature of milk on sale is legal. 507.

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OWNERSHIP—

Of a fund bequeathed to the directors of a county infirmary for the benefit of inmates of the infirmary. 394.

PARENT AND CHILD—

Dissensions between parents do not release a father from the obligation to support his children; the obtaining of a decree of divorce by the father in another state, after a separation of many years, does not bar the mother of her right to recover for money expended in the support of the children prior to the granting of the decree. 142.

The residence of a minor is determined by the domicile of his parent, or of some one standing in the relation of parent; where the father dies at the residence of his father and the child continues to reside with the grandfather, the residence of the grandfather becomes the residence of the minor. 233.

Counsel fees, due from a father and earned in an action to wrest from his child an interest in land belonging to the child, can not be assessed against the child. 255.

An order giving a divorced mother the custody of her minor child is annulled by the death of the mother; if necessity exists for appointing a guardian for the child, it must be shown that the father is an unsuitable person before a stranger can be appointed. 566.

PARTIES—

The beneficiaries under a policy of life insurance are necessary parties to an action for recovery of premiums paid, on the ground that the contract has been rescinded, or on the ground of wrongful refusal by the company to receive further premiums. 97.

A guardian, who has been removed by the probate court for lack of jurisdiction to make the appointment, is not a party in a fiduciary capacity and can not appeal in the interest of the trust. 449.

PARTITION—

Effect of an amicable partition on inchoate dower; mortgage given by one tenant in common to equalize the allotments (the wife not joining) is subordinate to her inchoate right of dower. 405.

PARTNERSHIP—

Organizations may have the attributes of partnerships, and as against creditors those so associated are generally regarded as partners under the doctrine of estoppel. 554.

A voluntary association, not for profit, composed of corporations, firms and individuals, organized for the mutual protection of the members and their employes and the amicable adjustment of their difficulties, is not as between the members themselves a partnership; and assessments to pay running expenses, levied by agree-

ment upon the members in the ratio of the number of operatives employed by each, is valid. 554.

PENALTY—

Where a penalty is added to a tax for non-payment, it is by way of punishment and can not be refunded. 577.

PHYSICIAN—

Prosecution of, as an alder and abettor in the sale of intoxicating liquor in a dry town. 277.

PLEADING—

The insolvency of a consolidated company can not be pleaded by the holder of bonds issued by a constituent company which are not yet due, where the action is against the stockholders of the consolidated company for enforcement of their statutory liability. 31.

Where in a suit on a promissory note, which is set forth in the petition, testimony is not admissible in support of averments of the answer which if established would go no further than to vary the written agreement. 25.

Necessary allegations in a suit for damages on account of injuries received from a fall on a sidewalk which was in a dangerous condition. 57.

A motion will not lie for an inspection of the minutes of a grand jury. 79.

In an action by the receiver of a mutual casualty insurance company for recovery of an assessment levied against a street railway company, which had become a member of the casualty company. 104.

Where a plaintiff pleads a right alleged to be vested in himself, and the proof discloses a right vested jointly in himself and another who is not a party to the action, the suit fails and should be dismissed. 97.

Special damages on account of a wrongful injury can not be recovered, where the petition does

not allege nor the evidence show special damages. 122.

A demurrer may be filed to charges in proceedings in disbarment; and will lie, when. 129.

In an action to enforce statutory liability against stockholders. 150.

An allegation that a thing is unlawful does not make it unlawful, and a demurrer to a petition containing such an allegation does not admit the truth of the allegation in the sense that it thereupon becomes the duty of the court to act upon the petition as though its truth were established. 239.

An allegation that a plaintiff, suing for recovery of money paid for certificates in a debenture company, has shared in the distribution of the assets of the company by its receivers, if proven, constitutes a *pro tanto* defense, and also states the further defensive fact that the plaintiff was a part owner of the business. 281.

A petition, evidently drawn with reference to the provisions of an unconstitutional act, is still good against demurrer when its allegations bring it within the provisions of the general laws on that subject. 317.

In an action by an insurance company against a railroad company for recovery of the amount paid on a policy of insurance covering a building destroyed by fire through the negligence of the railroad company. 373.

The pleading of facts is not open to objection in an action for negligence, where the pleader is thereby relieved from the necessity of pleading conclusions as to the concurrence of negligence or non-concurrence of contributory negligence. 373.

In an action brought by a prosecuting attorney, under Section 1277, to recover back money paid out on an illegal county bridge contract; averments which are good against a motion to strike out. 423.

Allegations which are sufficient

to support a petition by a township board of education seeking to enjoin the county commissioners from interfering with their management of the township schools. 443.

Where a defendant pleads contributory negligence as a defense, he may be required to set out the acts of negligence on the part of the plaintiff upon which he relies. 542.

In an action to enjoin interference with the grant of a monopoly for the transportation of dead animals, not slaughtered for food, through the streets, and for the utilization of their carcasses. 649.

POLICE POWER—

With reference to control over the removal and utilization of dead animals within a municipality, which have not been slaughtered for food; with reference to the protection of the public health. 649.

PRESUMPTION—

There is no presumption of notice to a municipality of the dangerous condition of a sidewalk, rendered so by a recent hard rain. 57.

One purchasing stock at par is entitled to the presumption that the original subscriber therefor paid for the stock in full, and a claim on account of unpaid stock subscription will not lie against such purchaser at par. 113.

Of negligence causing death; where a verdict is based upon, and there is a still stronger presumption of the absence of negligence, the verdict will be set aside. 249.

Favors an ancient fence as showing the true boundary line where the original monuments have disappeared. 465.

In an action to enjoin a municipality from interfering with property rights, there is a presumption that the defendant officials are acting within the scope of their authority. 649.

PRIORITY—

Of inchoate right of dower over mortgage (the wife not joining) given to equalize allotments in an amicable partition. 405.

PROMISSORY NOTES—

In a suit on a promissory note which is set out in the petition, testimony proffered by the defendant in support of averments of the answer, which it sustained would go no further than to vary the written contract, is inadmissible. 25.

It is not sufficient to establish by a mere preponderance of the testimony that the note sued on was executed in acknowledgment of a gift and not as a promise to pay; such claim must be established by evidence clear and convincing. 25.

PROSECUTING ATTORNEY—

A county prosecuting attorney is authorized to bring an action for recovery of interest earned by public funds which have been deposited in bank with knowledge on the part of the bank of their character and without authority of the depository law. 245.

PROXIMATE CAUSE—

Where two acts of negligence are alleged and these unite in causing an injury, it is not a question of proximate and remote cause, but of concurring causes, and the plaintiff may allege both and prove the defendant's responsibility for both if he can. 373.

PUBLICATION—

See Advertisement.

PUBLIC LANDING—

The function of a public landing is much broader and more important than that of a street, and considerations which would forbid the occupation of a street with permanent supports for an overhead railway structure are of commanding importance in the case of a public landing. 497.

PUBLIC POLICY—

The fact that public policy and

good business judgment favor an advantageous contract for the joint use by the city and an electric light company of city poles, furnishes no warrant for the countenance by a court of such joint use, where the entering into such a contract is manifestly *ultra vires* on the part of the municipality. 329.

PUNCTUATION—

Varying punctuation of Section 5435, relating to homestead exemption. 631.

RAILWAYS—

See Carriers and Street Railways.

Council is without power, as the statutes exist to-day, to authorize the placing of piers, abutments or posts in the street for the support of overhead structures. 217.

Taxation of railroad property; where it lies partly within and partly without the state; when property may be "localized" and when it must be "averaged" over the entire line; bridges, viaducts, trestles, side-tracks, slopes, freight yards, and ground purchased for connection tracks with other roads; powers of a county auditor to treat property as omitted or as under-valued for taxation. 345.

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A municipality is without power to grant to a railway company the right to the exclusive use of portions of streets and public places for permanent supports for an overhead railway structure. 497..

RECEIVER—

The mere insolvency of a corporation is not sufficient ground for the appointment of a receiver. 155.

A contract creditor of a corporation will not be heard to ask for a receiver to collect unpaid stock subscriptions, until he has reduced his claim to judgment and execution thereon has been returned unsatisfied. 155.

Action by a receiver of a building association against the receiver of a bank for recovery on a fraudulent entry made by the cashier of the bank in favor of the building association of which he was the treasurer. 587.

RECORDS (Of Suits)—

Common pleas court has jurisdiction under Section 6708 to consider errors of fact not appearing on the record, and of which the record is not compelled to speak; where the challenge is as to facts as to which the record is not compelled to speak, the record should be corrected in the court making it. 55.

REPEALS—

See Statutes.

The constitutional amendment which became effective November 23, 1903, repealed by implication the provision of Section 3258 relating to the double liability of stockholders. 201.

RESCISSION—

Of a contract for purchase and sale of real estate, where the purchaser has been placed in possession and is in default for payment. 638.

RESERVE FUND—

The reserve fund of a life insurance company can not be regarded as a debt owing to the policy holders and thus escape taxation. 297.

RESIDENCE—

The word "residence" as used in Section 6254, relating to the appointment of guardians for minors by the probate court, means "domicile." 233.

Where a minor has been domi-

ciled with his grandfather but goes to live with his aunt in another county, the residence of the minor is the residence of the grandfather, when. 233.

RESTRAINT OF TRADE—

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RIGHTS—

The right of the contracting parties to a policy of fire insurance to demand an appraisal becomes *functus officio*, when. 41.

SCHOOLS—

Authority of a township board to suspend schools or abolish sub-districts; county commissioners without power to reserve action of township board or interfere with the exercise by the township board of its judicial duties; county commissioners may step in and perform ministerial duties belonging to a township board, when; injunction; pleading; centralized schools. 433.

SCINTILLA RULE—

Application of, in an action for wrongful death where the evidence of negligence is an inference only drawn from circumstances, and there is a still stronger inference of the absence of negligence which may be drawn from circumstances clearly proven. 249.

There is no place in our jurisprudence for the scintilla rule, as that rule is commonly understood and applied; if the only rational view that can be taken of plaintiff's evidence is that it has not proved anything, a motion to direct a verdict should be granted. 529.

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The act for the regulation of, constitutional; a fine of \$50 for failure to keep certain goods on hand for thirty days not excessive, nor an abuse of discretion on the part of the trial court. 398.

SENTENCE—

Unexpected severity of, where pronounced under a plea of guilty,

not ground for vacating, when. 361.

A fine of \$50 imposed on a second-hand dealer for failure to keep certain goods on hand for thirty days is not excessive nor an abuse of discretion on the part of the trial court. 398.

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SIDEWALK—

Municipality not liable on account of injury to pedestrian on a walk rendered slippery from mud, unless. 57.

Constructive notice of bad condition of walk can not be based upon temporary conditions of recent operation. 57.

SITUS—

Of banks appearing as bidders for the use of the public funds under the county depository act (98 O. L., 274). 481.

SPECIFIC PERFORMANCE—

Where A purchases land from B which B has purchased from C, but which C has not transferred to B, specific performance can not be enforced by A against C, nor can A compel B to compel C to carry out his contract. 126.

Where a suit for specific performance is brought against a defendant who has no title, and

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STATUS—

Of "dry" territory which has been annexed to a municipality wherein the sale of intoxicating liquor has not been forbidden. 417.

STATUTES—

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Power can not be conferred upon council by an amendment to an obscure penal statute to grant rights which interfere with the public in and to the ordinary use of the streets. 217.

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The repeal of a statute relating to a sewer improvement after proceedings for the construction of the sewer have been begun, but before the passage of the assessing ordinance does not render the assessment invalid. 641.

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STATUTE OF FRAUDS—

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STOCKHOLDERS—

Liability of, secondary, and can only be enforced upon a claim

against the corporation which has been reduced to judgment and execution thereon returned *nulla bona*. 31.

The exception which saves the holder of a meritorious claim from unnecessary and perhaps fatal delay, does not permit the insolvency of a consolidated company being pleaded in an action by a holder of bonds in one of the constituent companies and not yet due, brought for enforcement of stockholder's liability. 31.

It is not a condition precedent to the enforcement of stockholder's liability against the estate of a decedent, that the claim be presented to the executor. 113.

Where stock in an insolvent corporation comes into the hands of a sole devisee, but is not specifically mentioned in the will and is not accepted by the devisee, stockholder's liability can not be enforced against the devisee individually. 113.

A discharge in bankruptcy not effectual to discharge a claim for stockholder's liability or unpaid subscription for stock, when. 113.

One purchasing stock at par is entitled to the presumption that the original subscriber therefor paid for the stock in full, and a claim on account of unpaid subscriptions will not lie against such purchaser at par. 113.

In an action to enforce statutory liability, a demurrer will lie to the answer of a defendant that he was not a stockholder at the time the debt was contracted. 150.

While an action to enforce statutory liability ought usually to be postponed until an ascertainment is made as to the assets of the corporation, an action brought by a creditor prior to such ascertainment is not demurrable on that ground. 150.

Statutory liability attaches to all who are stockholders at the time of the enforcement of such liability, regardless of the date on

which they became stockholders. 150.

An answer by the executor of a deceased stockholder that he has fully settled up the estate, but who does not plead the statute of limitations, does not state a good defense against stockholders' liability. 150.

Where the insolvent corporation is a bank, organized under the laws of Ohio, an answer to a suit to enforce statutory liability that the defendant is not liable for anything beyond the subscription price of his stock is demurrable. 150.

The going into effect of the constitutional amendment of November 23, 1903, repealed by implication the provision of Section 3258 as to double liability. 201.

Stockholders in Ohio corporations are relieved from double liability from and after November 23, 1903. 201.

Action by, for recovery of a dividend declared; a dividend legally declared is a debt of the company to the stockholder as an individual, and as such is beyond the control of either the stockholders or the directors. 609.

STREET—

Asphalt is not a patented article and is not controlled by any trust or company. 1.

Selection of material for improvement of, by council in the alternative; selection by the board of public service from the materials named by council; abutting owners without right to name material; nor can the discretion of the proper officers be interfered with. 1.

Statutes relating to bridges and grade crossings are not applicable to the use of the streets by railway companies for the support of overhead crossings, where such use interferes with the ordinary rights of the public in and to the ordinary use of the streets. 217.

There is an entire absence of power in council, under the statutes as they exist to-day, to authorize the erection of any abutment, pier or support in a public way, which will necessarily prevent a joint use by the public of the part so occupied. 217.

Application to proceedings for street improvements of Section 2702, imposing restrictions as to contracts, appropriations and expenditures. 317.

Surplusage in petition for improvement of; facts necessary to give council jurisdiction to proceed with improvement; remedy of contractor for improvement who has not been paid. 317.

Assessment for improvement of; in an action for reduction of assessment; testimony as to value of abutting property before and after the improvement, which leaves the court in doubt will be resolved against the plaintiff. 411.

Estoppel against the contesting of an assessment by a grantee who purchased subsequent to the making of the levy will not be inferred, unless. 411.

Expressions in a deed with reference to payment of the assessment will be construed in favor of the grantee, when. 411.

Limitation of control of, by the general public. 493.

A municipal council is without power to grant to a railroad company the right to occupy any portion of a street or public place with a fixed and permanent support for a viaduct or overhead railway structure. 497.

It is not within the function of the probate court in granting a telephone franchise to make provision for extraordinary uses of the streets, such as the moving of buildings. 624.

STREET RAILWAYS—

See Railways.

Liability of, for injury to a passenger who had just alighted and is struck by car on parallel track;

right of pedestrian in street on a crossing. 13.

A street railway company may become a member or stockholder of a mutual insurance association or company for the purpose of absolving it against injuries of every nature and description to persons or property, causing loss, damage or liability. 104.

A municipality as an abutting owner may "consent" to the building of a street railway; limitation of control of general public over street. 493.

STRIKES—

A court of record has complete jurisdiction and inherent power to punish strikers for contempt, when there has been unlawful interference with or irreparable injury to the business of an employer. 161.

The only question on review in case of contempt proceedings against strikers is, whether the judgment rendered is sustained by the evidence. 161.

Peaceful enticement of employees to quit their work when they are not under contract to remain, and giving them railroad tickets and travelling expenses for themselves and their families to go to another city is not unlawful persuasion and not a contempt of a previous order of court which enjoined against unlawful persuasion. 161.

The motive of strikers is immaterial and does not render them liable to punishment for contempt, where the action complained of was within their rights. 161.

SURETIES—

Correspondence between the creditor and surety with reference to urging the maker of a note to pay it, such as was had in this case, does not constitute sufficient notice under Section 5833 to relieve the surety, where the owner neglected to bring suit on the note for six years. 49.

On the bonds of public officials are bound for the faithful per-

formance of duties imposed by law only, and not for malfeasance as to duties not imposed by law. 145.

Liability of, on a bond for a temporary injunction in a case which is not prosecuted; liability attaches whether the action is dismissed at the request of the plaintiff, or because of his failure to prosecute. 273.

A lessee from an assignee is a surety, and the lessor has his remedy against either. 265.

On an appeal bond discharged by the discharge of the appellant in bankruptcy. 571.

TABULAR WORK—

The annual report of county commissioners, when published with "leaders" and additional justification, is tabular work within the meaning of Section 4366, and in the absence of a special contract the publisher is entitled to be paid a price and a half therefor. 35.

TAXATION—

Funds derived by an administrator from the sale of mortgaged premises, and deposited by him in bank preparatory to payment to the mortgagees, should be listed by the administrator for taxation, notwithstanding the entire amount will be required to satisfy the liens which have been ordered paid. 214.

Accumulated deferred dividends or undivided profits arising on life rate endowment policies are not a "legal *bona fide* debt owing" and can not be legally deducted from the company's credits when its return is made for taxation. 297.

The reserve fund of a life insurance company can not, under the Ohio laws governing taxation, be deducted from the company's tax return. 297.

Bank deposits are not relieved from taxation merely because the fund has been checked against, unless the checks have been presented for payment, or have been

certified, or the bank has otherwise become irrevocably committed to the holder. 297.

Uniform taxation and double taxation; tax returns of corporations subject to the same rules as those of individuals. 297.

In entering for taxation the property of a railroad which lies partly within and partly without the state, Sections 2772 and 2776 should govern, and not Section 2774. 345.

Property of a railroad which may be "localized" for taxation, and property which must be "averaged" over the entire line; bridges, viaducts, trestles, side-tracks, slopes, freight yards, and ground purchased for a connection track with another railroad. 345.

Powers of a county auditor under Section 2781a; can not treat railroad property as omitted property which has escaped taxation; or as property which has been under-valued, when. 345.

Interpretation of Sections 1343-1 and 1343-4, relating to the employment of tax inquisitors. 454.

After a liquor tax has been regularly entered by the county auditor, the duplicate becomes by operation of the statute *prima facie* evidence as to the amount and validity of the tax. 577.

Penalties are assessed by way of punishment and can not be refunded; failure to make a demand for payment of a liquor tax becomes immaterial after levy has been made and the parties are before the court. 577.

TAX-PAYER—

The right of, to enjoin an unauthorized issue of bonds is available to one owning property in a village as well as a city. 513.

TELEGRAPH AND TELEPHONE—

A telephone company obtains its right to use the streets from the Legislature, and the function of the probate court includes

neither the length nor extent of such use, but is strictly limited to the mode of use. 624.

In fixing the mode of use of streets by a telephone company, the probate court has no duty to perform with reference to the preservation of the streets for extraordinary uses, such as the moving of a building along or across the street. 624.

Duration of telephone franchise; probate court without power to limit. 624.

TENANTS IN COMMON—

Effect of amicable partition on inchoate right of dower; mortgage subordinate to, when. 405.

TITLE—

The use of the word "heirs" or other words of perpetuity in a trust deed are not necessary to vest a fee simple title in a trustee, when the face of the deed discloses a purpose to grant power of sale to the trustee. 90.

Exceptions to the rule as to use of words of inheritance and words of limitation. 90.

A suit for specific performance brought by one who knew at the time of the filing of the suit that the defendant was without title, can not be retained for the purpose of assessing damages. 126.

Character of, in *cestui* receiving the net income in any event, with power to collect and no discretionary control in the trustee. 265.

A successor to the title of a lessee, by entering upon the estate and paying rent for a period of years to the present claimant of title, has attained to the reversioner and is estopped from denying his title. 265.

A conveyance by a claimant of title to her daughter with a reservation of a life estate is not an eviction or breach of covenant for quiet enjoyment. 265.

To property transferred by a husband for an inadequate con-

sideration, after suit had been brought against him for divorce and alimony of which he had knowledge, but before service was had upon him. 427.

TOWNSHIP TRUSTEES—

Jurisdiction of, in the matter of effecting the incorporation of a village. 561.

TRESPASS—

Trespasser under claim of title; waiver of trespass. 638.

TRIAL—

The constitutional guaranty of a public trial is violated by a rule of court which excludes from the court room all the world except officers of court, witnesses, certain relatives and newspaper men; where there has been a deprivation of a constitutional right, the law presumes that an injury has been sustained. 401.

In a trial for bigamy, the refusal of the court to permit a common-law wife to testify on account of her relationship to the defendant is not prejudicial to the defendant when accompanied by an explicit statement to the jury that no fact with reference to the alleged common-law marriage is thereby determined. 502.

Where the only rational view that can be taken of plaintiff's evidence is that it has not proved anything, a motion to direct a verdict for the defendant should be granted, notwithstanding the scintilla rule. 529.

TRUSTS—

Use of the word "heirs" or other words of perpetuity in a trust deed not necessary to vest a fee simple title in a trustee, where the face of the deed discloses a purpose to grant power of sale to the trustee; omission to name successor of trustee without significance, when. 90.

A mere repository of title, when. 90.

Relation of *quasi* trustee creat-

ed where public funds are deposited in bank with knowledge on the part of the bank of their character and without authority of the depository law. 245.

Character of the title in a *cestui* who receives the net income from land in any event, with power to collect and no discretionary control in the trustee. 265.

ULTRA VIRES—

Is an attempted grant by a municipality of the right to an electric company to place its wires on municipal poles. 329.

For a corporation to become a member of an organization of corporations, firms and individuals, not for profit, but for mutual protection of the interests of the members and their employees, is not *ultra vires*. 554.

VALENTINE ANTI-TRUST LAW—

Penalty clause of, not in contravention of the Constitution because not of uniform operation throughout the state. 361.

Covers the business of insuring property against fire. 377.

VERDICT—

For damages for wrongful death will be set aside, where based upon a presumption of negligence and a still stronger presumption exists of the absence of negligence. 249.

It is the duty of a trial judge to grant a motion for a directed verdict for the defendant, when the only rational view of the plaintiff's evidence is that it has not proved anything. 529.

VESTED INTEREST—

Of beneficiaries under a policy of life insurance. 97.

Where a plaintiff pleads a right alleged to be vested in himself, and the proof discloses a right vested in himself and another who is not a party to the action, the suit fails and should be dismissed. 97.

VILLAGE—

A tax-payer has the same right to enjoin a village as a city from issuing bonds not authorized by law. 513.

The map which accompanies a petition for the incorporation of a village complies with the requirements of the statute, when; if the county commissioners have power to act upon such a petition, the township trustees are without power; where a portion of the territory included within the proposed corporation has therefore been platted, the incorporation must be effected by the county commissioners under Section 1553. 561.

WARRANTY—

Language of, in a deed that the premises are free and clear of all incumbrances except certain unpaid street assessments does not *per se* impose upon the grantee the obligation to pay the assessment. 411.

WATER AND WATER-COURSES—

Authority to straighten, widen or deepen a water-course is not conferred upon county commissioners by Section 4483, by a petition of a mayor acting under resolution of a city council in that behalf. 185.

Streams which empty one into other and that one into a third are not separate water-courses within the meaning of the statutes relating to the construction of public ditches. 545.

WATER METERS—

The placing of, on service pipes leading to private residences is within the discretion of the city council and not of the board of public works. 593.

WIDOW—

A divorced woman is not a "widow" within the contemplation of the statute allowing homestead exemption to insolvent debtors.

with families or other dependents. 631.

WILLS—

Held that a bequest to directors of a county infirmary did not become the property of the county. 394.

A clause in a will can not be revoked by the drawing of ink lines through it by the testator; the legatees, in this case, included within the phrase "or other relative," must be related to the testator by blood, and not by marriage. 654.

The provision of the statutes of wills (Section 5971), providing against the failure of a devise, applies to nephews and nieces as a "class," as well as to children as a "class." 654.

WORDS AND PHRASES—

The word "give" has a much broader meaning than donate. 25.

Meaning of a restriction in a deed requiring that the front line of any building erected thereon shall not be nearer the street than the house next east. 65.

Use of the word "heir" or other

words of perpetuity in a trust deed not necessary to vest title in fee simple in a trustee, when. 90.

The maxim *expressio unius est exclusio alterius* is not of universal application; can not be invoked as the basis of a grant of express power to a municipal council, when. 217.

The word "resident" as used in Section 6254, relating to the appointment of guardians for minors by the probate court. 233.

Meaning of the word "beverage" as used in the statutes relating to intoxicating liquors. 339.

Meaning of the word "situated" as used in the county depository act (98 O. L., 274). 481.

The phrases "inalienable rights" and "equal protection of the laws" relate to the private, personal, civil or political rights of natural persons only. 481.

The word "widow" does not include a divorced woman. 631.

Meaning of the words "or other relative" under the saving clause of Section 5971, to prevent a bequest from lapsing. 654.

E. J. A.
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